This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

HARVARD LAW LIBRARY
3 2044 078 474 947

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google

Digitized by Google

New York (State) Courts 15
Aug 3

THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court,

INCLUDING

THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX AND THE MUNICIPAL COURTS OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX; SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF THE CITY OF NEW YORK, THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE CITY AND COUNTY OF NEW YORK, COUNTY COURTS, AND OF THE SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 593.

ROBERT G. SCHERER, REPORTER.

VOLUME XLIV.

ALBANY:
J. B. LYON COMPANY, PUBLISHERS.
1904.

Digitized by Google

Entered according to act of Congress, in the year one thousand nine hundred and four

By JOHN F. O'BRIEN, Secretary of the State of New York,

In trust for the benefit of the People of the said State in the office of the Librarian of Congress, at Washington, D. C.

Rec. Jan. 18, 1905.

Digitized by Google

Justices Of The Supreme Court

Other than Those Designated to Constitute The Appellate Division.

FIRST JUDICIAL DISTRICT.

Hon. EDWARD B. AMEND,
" GEORGE C. BARRETT,
" HENRY BISCHOFF, Jr.,
" JAMES A. BLANCHARD,
" JOHN PROCTOR CLARKE,
" VERNON M. DAVIS,
" P. HENRY DUGRO,
" JAMES FITZGERALD,
" JOHN J. FREEDMAN,*
Hon. LEONARD A. GIEGERICH,
" HENRY A. GILDERSLEEVE,*
" SAMUEL GREENBAUM,*
" DAVID LEVENTRITT,*
" EDWARD E. McCALL,
" CHARLES F. MacLEAN,*
" JAMES A. O'GORMAN,
" FRANCIS M. SCOTT,*
" CHARLES H. TRUAX.*

SECOND JUDICIAL DISTRICT.

Hon. WILLIAM D. DICKEY,
" GARRET J. GARRETSON,
" WILLIAM J. GAYNOR,
" WILLIAM J. KELLY,
Hon. MARTIN T. KEOGH,
" SAMUEL T. MADDOX,
" JOSIAH T. MAREAN,
" WILMOT M. SMITH.

THIRD JUDICIAL DISTRICT.

Hon. JAMES A. BETTS,
" AARON V. S. COCHRANE,
Hon. D. CADY HERRICK,
" WESLEY O. HOWARD.

FOURTH JUDICIAL DISTRICT.

Hon. HENRY T. KELLOGG,
Hon. JOHN M. KELLOGG,
Hon. EDGAR A. SPENCER.

FIFTH JUDICIAL DISTRICT.

Hon. WILLIAM S. ANDREWS,
" WATSON M. ROGERS,
Hon. WILLIAM E. SCRIPTURE,
" MAURICE L. WRIGHT.

SIXTH JUDICIAL DISTRICT.

Hon. GERRIT A. FORBES,
" GEORGE F. LYON,
Hon. NATHAN L. MILLER,†
" ALBERT H. SEWELL.

SEVENTH JUDICIAL DISTRICT.

Hon. JOHN M. DAVY,
" JAMES W. DUNWELL,
" EDWIN A. NASH,
Hon. JOHN F. PARKHURST,
" ADELBERT P. RICH,
" JAMES A. ROBSON.**

EIGHTH JUDICIAL DISTRICT.

Hon. HENRY A. CHILDS,
" DANIEL J. KENEFICK,
Hon. FREDERICK W. KRUSE,
" JOHN S. LAMBERT,
Hon. TRUMAN C. WHITE.

JUSTICES OF THE CITY COURT OF THE CITY OF NEW YORK.

Hon. EDWARD F. O'DWYER, Ch. J., §
" LEWIS J. CONLAN,
" FRANCIS B. DELEHANTY,
Hon. THEODORE F. HASCALL,
" JOHN HENRY McCARTHY,
" JOHN PALMIERI, §§
Hon. SAMUEL SEABURY.

JUDGES OF THE COURT OF GENERAL SESSIONS OF THE PEACE OF THE CITY OF NEW YORK.

Hon. JOHN W. GOFF, Recorder.
" RUFUS B. COWING, City Judge.
Hon. WARREN W. FOSTER, Judge.
" MARTIN T. McMAHON, Judge.
Hon. JOSEPH E. NEWBURGER, Judge.

---

*Also designated by the Appellate Division, First Department, to hold the Appellate Term of the Supreme Court for the hearing of appeals from the City Courts of New York for the boroughs of Manhattan and The Bronx, and The Municipal Courts of the city of New York for the boroughs of Manhattan and The Bronx.

§ Appointed Chief Judge, vice James M. Fitzsimons, deceased.

† Appointed Nov. 10, 1903, vice Burr Mattice, deceased.

** Appointed Oct. 19, 1903, vice William H. Adams, deceased.

§§ Appointed July 18, 1904, vice James M. Fitzsimons, deceased.

Digitized by Google

County Judges

Hon.	CLIFFORD D. GREGORY	Albany county.
	ELBA REYNOLDS*	Allegany county.
	ROBERT S. PARSONS*	Broome county.
	WINFIELD SCOTT THRASHER	Cattaraugus county.
	ADOLPHUS H. SEARING	Cayuga county.
	JEROME B. FISHER	Chautauqua county.
	GEORGE McCANN*	Chemung county.
	ALBERT F. GLADDING*	Chenango county.
	ROBERT E. HEALEY	Clinton county.
	SANFORD W. SMITH	Columbia county.
	JOSEPH E. EGGLESTON*	Cortland county.
	JOHN P. GRANT*	Delaware county.
	SAMUEL K. PHILLIPS	Dutchess county.
	EDWARD K. EMERY	Erie county.
	ROWLAND C. KELLOGG*	Essex county.
	SAMUEL A. BEMAN*	Franklin county.
	WILLIAM C. MILLS	Fulton county.
	EDWARD A. WASHBURN*	Genesee county.
	JOSIAH C. TALLMADGE*	Greene county.
	TIMOTHY D. SULLIVAN*	Hamilton county.
	IRVING R. DEVENDORF*	Herkimer county.
	EDGAR C. EMERSON	Jefferson county.
	JOSEPH ASPINALL	Kings county.
	FREDERICK E. CRANE	Kings county.
	EDGAR S. K. MERRELL*	Lewis county.
	WILLIAM CARTER*	Livingston county.
	JOHN E. SMITH*	Madison county.
	ARTHUR E. SUTHERLAND	Monroe county.
	CHARLES S. NISBET	Montgomery county.
	ROBERT SEABURY*	Nassau county.
	CHARLES HICKEY*	Niagara county.
	WATSON T. DUNMORE	Oneida county.
	WILLIAM M. ROSS	Onondaga county.
	WALTER H. KNAPP	Ontario county.
	JOHN J. BEATTIE	Orange county.
	EDWARD B. SIMONDS*	Orleans county.
	MERRICK STOWELL	Oswego county.
	JAMES W. BARNUM	Otsego county.
	J. BENNETT SOUTHARD*	Putnam county.
	BURT J. HUMPHREY	Queens county.
	MICHAEL A. TIERNEY	Rensselaer county.
	STEPHEN D. STEPHENS*	Richmond county.
	ANDREW X. FALLON*	Rockland county.
	LEDYARD P. HALE	St. Lawrence county.
	NASH ROCKWOOD	Saratoga county.
	ALEXANDER M. VEDDER*	Schenectady county.
	WATSON LAMONT*	Schoharie county.
	SAMUEL C. KEELER*	Schuyler county.
	JOHN E. RICHARDSON*	Seneca county.
	WILLIAM W. CLARK	Steuben county.
	WALTER H. JAYCOX	Suffolk county.
	GEORGE H. SMITH*	Sullivan county.
	HOWARD J. MEAD*	Tioga county.
	CHARLES H. BLOOD	Tompkins county.
	JOHN G. VAN ETTEN	Ulster county.
	LYMAN JENKINS*	Warren county.
	CHARLES R. PARIS	Washington county.
	S. NELSON SAWYER*	Wayne county.
	WILLIAM P. PLATT	Westchester county.
	JAMES E. NORTON	Wyoming county.
	JOHN T. KNOX*	Yates county.

Special County Judges

Hon.	DANFORTH R. LEWIS	Cayuga county.
	FRANK S. WHEELER	Chautauqua county.
	HENRY H. HARRINGTON	Chenango county.
	ALPHONSO E. COOLEY	Jefferson county.
	JOHN B. M. STEPHENS	Monroe county.
	GEORGE T. DAVIS	Oneida county.
	FRANK LYBOLT	Orange county.
	FREELON J. DAVIS	Oswego county.
	ARTHUR T. JOHNSON	St. Lawrence county.
	REUBEN B. JELLIFF§	Sullivan county.
	FRANK A. BELL	Tioga county.
	S. EDWIN BANKS	Tompkins county.
	SILAS E. EVERTS	Washington county.

* Also Surrogate.

§ Also Special Surrogate.

Digitized by Google

Surrogates

Hon. GEORGE H. FITTS	Albany county.
CAREY D. DAVIE	Cattaraugus county.
WALTER E. WOODIN	Cayuga county.
EGBERT E. WOODBURY	Chautauqua county.
JOHN H. BOOTH	Clinton county.
JOHN V. WHITBECK	Columbia county.
WILLET E. HOYSRADT	Dutchess county.
LOUIS W. MARCUS	Erie county.
JEREMIAH KECK	Fulton county.
CHARLES L. ADAMS	Jefferson county.
JAMES C. CHURCH	Kings county.
GEORGE A. BENTON	Monroe county.
W. BARLOW DUNLAP	Montgomery county.
ABNER C. THOMAS	New York county.
FRANK T. FITZGERALD	New York county.
FREDERICK M. CALDER	Oneida county.
EDGAR P. GLASS	Onondaga county.
GEORGE F. DITMARS	Ontario county.
OBADIAH P. HOWELL	Orange county.
SHELDON B. MEAD	Oswego county.
NATHANIEL P. WILLIS	Otsego county.
DANIEL NOBLE	Queens county.
WILLIS E. HEATON	Rensselaer county.
ALRIC R. HERRIMAN	St. Lawrence county.
CHARLES C. LESTER	Saratoga county.
EDWARD C. WHITMYER	Schenectady county.
MONROE WHEELER	Steuben county.
NATHAN D. PETTY	Suffolk county.
CHARLES DAVIS	Ulster county.
FREDERICK FRASER	Washington county.
THEODORE H. SILKMAN	Westchester county.

Special Surrogates

Hon. JAMES E. TURNER	Cayuga county.
LESLIE A. PEASE	Chautauqua county.
FRANK T. EVANS	Jefferson county.
WILLIS W. BYAM	Oneida county.
JOHN B. SWEZEY	Orange county.
CLAYTON I. MILLER	Oswego county.
JOSEPH YORK CHAPIN	St. Lawrence county.
CHARLES G. DAVIS	Washington county.

Digitized by Google

Digitized by Google

CASES REPORTED IN THIS SERIES WHICH HAVE BEEN AFFIRMED OR REVERSED.

	VOL.	PAGE.
Bannister v. City of New York	40	408
Affirmed: 96 App. Div. 625.		
Blumenfeld v. Stine	42	411
Affirmed: 96 App. Div. 160.		
City of New York v. Cody	44	270
Affirmed: 95 App. Div. 632.		
Commercial Travelers' Assn. v. McNamara	42	258
Reversed: 95 App. Div. 1.		
Cook v. Straiton	41	206
Affirmed: 96 App. Div. 625.		
Doll v. Smith	43	417
Reversed: 95 App. Div. 632.		
Dougherty v. Lion Fire Ins. Co.	41	285
Affirmed: 95 App. Div. 618.		
Duntz v. Granger Brewing Co.	41	177
Affirmed: 96 App. Div. 631.		
Fisher v. Young	41	552
Affirmed: 95 App. Div. 619.		
Hudson River Water Power Co. v. Glens Falls Portland Cement Co.	41	254
Affirmed: 95 App. Div. 620.		
Interborough Rapid Transit Co. v. Gallagher	44	536
Affirmed: 96 App. Div. 632.		
Jackson v. Tailer	41	36
Affirmed: 96 App. Div. 625.		
McGown v. Barnum	42	585
Modified and affirmed: 96 App. Div. 626.		
Matter of Hollister v. City of Rochester	41	559
Affirmed: 96 App. Div. 501.		
Matter of Ingersoll	41	600
Modified and affirmed: 95 App. Div. 211.		
Matter of Mayor	34	719
Order reversed and report modified as stated in opinion, and as modified affirmed, 95 App. Div. 552.		
Moulton v. Westchester Racing Assn.	42	487
Affirmed: 95 App. Div. 276.		
People v. New York Building-Loan Banking Co.	41	363
Affirmed: 96 App. Div. 625.		
People v. Rothstein	42	123
Reversed: 95 App. Div. 292.		

Digitized by Google

	VOL.	PAGE.
People ex rel. Canton Bridge Co. v. Board of Auditors.....	42	116
Affirmed: 95 App. Div. 620.		
Roblee v. Masonic Life Assn.	38	481
Affirmed: 95 App. Div. 620.		
Sponenburgh v. City of Gloversville	42	563
Affirmed: 96 App. Div. 157.		
Tolmie v. Fidelity and Casualty Co.	41	451
Affirmed: 95 App. Div. 352.		
Topham v. Interurban St. R. Co.....	42	503
Reversed: 96 App. Div. 323.		
Town of East Fishkill v. Town of Wappinger	41	428
Reversed: 97 App. Div. 7.		
Winne v. Winne	40	435
Affirmed: 95 App. Div. 48.		

Digitized by Google

TABLE

OF

CASES REPORTED.

A. PAGE.

Adair, People ex rel., Lasher v. 444
Adams, People ex rel. v. Johnson 550
Adler, Lederer v. 217
American Bank, Young v. (Action No. 1) 305
American Bank, Young v. (Action No. 2) 308
American Watchman's T. D. Co., Gray Lithograph Co. v. 206
Arthur v. Pullman Co. 229

B.

Baird v. Van Vechten 279
Baldwin v. Rice 64, 74
Barson v. Mulligan 26
Bell, Fleishauer v. 240
Bender, Matter of 79
Bills, People v. 348
Binghamton & Lestershire Baseball Assn., Dunham v.. 112
Bishopp, People v. 12
Blair, People ex rel. v. Grout. 526
Bloom, Raynes v. 81
Board of Education, Bogert v. 10
Board of Education, Southold Savings Bank v. 74
Bogert v. Board of Education. 10
Bosea v. Lent 437
Bowne v. Smith 575
Brearton, Matter of 247
Breen, People ex rel. Hammond v. 375
Brooklyn Labor Lyceum Assn., Haack v. 273
Burnham v. Franklin 299
Burns, Hale v. 1

C.

Cahill v. Hogan 360
Cerimedo, Pough & Co. v. 246
Charlier, Goff v. 28
Chicago & Eastern Ill. R. R. Co., Kissel v. 156
City of New York v. Cody. . . . 270
City of New York, Hartmann v. 272

PAGE.

City of New York v. Holzderber 509
City of New York, Matter of (Eighth Street) 126
City of Rochester v. Farrar.. 394
City of Rochester, McCall v.. 129
Clinch, Matter of 190
Cody, City of New York v.... 270
Cohn, Zeiser v. 462
Commins v. Perry 458
Commonwealth Trust Co., Gause v. 46
Condit v. Goodwin 312
Connolly, Schwoerer v. 222
Cullin v. Ryder 485

D.

David, Matter of (Adelaidé). 337
David, Matter of (In re Town of Lebanon) 192
David, Matter of (Nellie)... 516
Day, Palmer v. 579
Deutsch, Kessler v. 209
Diederichs v. Diederichs..... 591
Donohue, Schieck v. 425
Dunham v. Binghamton & Lestershire Baseball Assn.. 112
Dunn, Smith v. 288

E.

Elias, Platt v. 401
Evans v. Utica & Mohawk Valley R. Co. 345

F.

Faile, Matter of 619
Faller v. Ranger 424
Farrar, City of Rochester v.. 394
Findley, Westminster Presbyterian Church v. 173
Finn, Matter of 622
Fireman's Ins. Co., Guarino v. 218
First National Bank v. Jennings 374
First National Bank, Tuttle v. 318
Fleishauer v. Bell 240

Digitized by Google

	PAGE.
Flynn, People ex rel. Patterson v.	20
Flynn, People's Trust Co. v.	6
Forty-second Street, M. & St. N. Ave. R. Co., Hennessy v.	198
Franklin, Burnham v.	299
Freeholders of Madrid, Matter of	431
Friederick & Sons Co., Thaney v.	134
Fuller Co. v. Manhattan Construction Co.	219

G.

Gadski-Tauscher v. Graff	418
Gallagher, Interborough Rapid Transit Co. v.	536
Galpin, Lantz v.	356
Gause v. Commonwealth Trust Co.	46
Germania Bank, Rosenberg v.	233
Germania Fire Ins. Co., Nestler v.	97
Glascoe v. Willard	166
Goff v. Charlier	28
Golden, Hughes v.	128
Goodkind v. Metropolitan St. R. Co.	30
Goodwin, Condit v.	312
Gore v. Gore	323
Graff, Gadski-Tauscher v.	418
Grand Lodge of Independent Order Free Sons of Israel, Korman v.	564
Gray Lithograph Co. v. American Watchman's T. D. Co.	206
Greenleaf, Town of Fayette v.	352
Grout, People ex rel. Blair v.	526
Gruenstein, Gurley v.	268
Guarino v. Fireman's Ins. Co.	218
Gurley v. Gruenstein	268

H.

Haack v. Brooklyn Labor Lyceum Assn.	273
Hagen v. New York Cent. & H. R. R. R. Co.	540
Halberstadt, Meyer v.	408
Hale v. Burns	1
Hallenbeck v. Hallenbeck	109
Halstead, Matter of	176
Hamilton, People ex rel. O'Toole v.	577
Hammond, People ex rel. v. Breen	375
Hanes, People ex rel. Haverly v.	475
Hardin, Matter of	441
Harrison v. Wallis	492
Hartmann v. City of New York	272
Havens Relief Fund Society, Smith v.	594
Haverly, People ex rel. v. Hanes	475
Hawley, Matter of	186
Heidlinger v. Onward Construction Co.	555
Hennessy v. Forty-second St., M. & St. N. Ave. R. Co.	198
Hitchcock v. Riley	260
Hogan, Cahill v.	360
Holzderber, City of New York v.	509
Home Savings Bank, Kelly v.	102
Hook v. Michigan Mutual Life Ins. Co.	478
Hoyt, Matter of	76
Hughes v. Golden	128
Hyman v. Segal	226

I.

Interborough Rapid Transit Co. v. Gallagher	536

J.

Jackson v. Jackson	44
Jacobs v. Mexican Sugar Refining Co.	409
James v. Libby, McNeal & Libby	210
Jennings, First National Bank v.	374
Johnson, People ex rel. Adams v.	550
Johnson v. Woodend	524
Johnstown Mining Co. v. Morse	504
Jokinsky v. Miller	239

K.

Keeper of State Reformatory, People ex rel. Stein v.	122
Kelly v. Home Savings Bank.	102
Kessler v. Deutsch	209
Kissel v. Chicago & Eastern Ill. R. R. Co.	156
Korman v. Grand Lodge of Independent Order of Free Sons of Israel	564

L.

Lantz v. Galpin	356
Lasher, People ex rel. v. Adair.	444
Lattan v. Totten	116
Lederer v. Adler	217
Lent, Bosea v.	437

Digitized by Google

	PAGE.
Levine, Shandley v.	23
Levy, People ex rel. v. Preston	267
Libby, McNeal & Libby, James v.	210
Lord v. Lord	530
Lyon, Schenectady R. Co. v.	275

M.

McAfee v. Wyckoff	380
McCall v. City of Rochester	129
McCaw, Slattery v.	426
McDowell v. Syracuse Land & Steamboat Co.	627
Maine Steamship Co., Roth Clothing Co. v.	237
Manhattan Construction Co., Fuller Co. v.	219
Marks, Stein v.	140
Matter of Bender	79
Matter of Brearton	247
Matter of City of New York (Eighth Street)	126
Matter of Clinch	190
Matter of David (Adelaide)	337
Matter of David (In re Town of Lebanon)	192
Matter of David (Nellie)	516
Matter of Faile	619
Matter of Finn	622
Matter of Freeholders of Madrid	431
Matter of Halstead	176
Matter of Hardin	441
Matter of Hawley	186
Matter of Hoyt	76
Matter of Merklen	169
Matter of Mitchell v. Northern Security O. & T. Co.	514
Matter of New York Sabbath Committee	422
Matter of Smith	384
Matter of Town of Hadley	265
Matter of Townsend	415
Matter of Westbrook	339
Matter of Young	521
Mendoza v. Rose	241
Merklen, Matter of	169
Metropolitan St. R. Co., Goodkind v.	30
Mexican Sugar Refining Co., Jacobs v.	409
Meyer v. Halberstadt	408
Michigan Mutual Life Ins. Co., Hook v.	478
Miller, Jokinsky v.	239
Millington, Spring v.	624
Morse, Johnstown Mining Co. v.	504
Mulligan, Barson v.	26
Mutual Reserve Life Ins. Co., Vandewater v.	316

N.

Nestler v. Germania Fire Ins. Co.	97
New York Building-Loan Banking Co., People v.	296
New York Cent. & H. R. R. R. Co., Hagen v.	540
New York Kerosene O. E. Co., Wright Steam Engine Works v.	580
New York Sabbath Committee, Matter of	422
Northern Security O. & T. Co., Matter of Mitchell v.	514

O.

Onward Construction Co., Heidlinger v.	555
O'Toole, People ex rel. v. Hamilton	577

P.

Palatine Ins. Co., Uhlfelder v.	153
Palmer v. Day	579
Parker, Price v.	582
Patterson, People ex rel. v. Flynn	20
People v. Bills	348
People v. Bishopp	12
People v. New York Building-Loan Banking Co.	296
People v. Poole	118
People v. Rathbun	88
People v. Smith	379
People v. Zabor	633
People ex rel. Adams v. Johnson	550
People ex rel. Blair v. Grout	526
People ex rel. Hammond v. Breen	375
People ex rel. Haverly v. Hanes	475
People ex rel. Lasher v. Adair	444
People ex rel. Levy v. Preston	267
People ex rel. O'Toole v. Hamilton	577
People ex rel. Patterson v. Flynn	20
People ex rel. Reynolds v. Warden of City Prison	149
People ex rel. Stein v. Keeper of State Reformatory	122
People's Co-operative Ice Co., Sanders v.	171
People's Trust Co. v. Flynn	6

Digitized by Google

PAGE.

Perry, Commins v. 458
Phalen v. United States Trust Co. 57
Platt v. Elias 401
Poole, People v. 118
Pough & Co. v. Cerimedo ... 246
Preston, People ex rel. Levy v. 267
Price v. Parker 582
Pullman Co., Arthur v..... 229

R.

Ranger, Faller v. 424
Ranken, Tanner v. 488
Rathbun, People v. 88
Raymond v. Security Trust & Life Ins. Co. 31
Raynes v. Bloom 81
Reid v. Town of Long Lake.. 370
Reynolds, People ex rel. v. Warden of City Prison.... 149
Rice, Baldwin v. 64, 74
Riley, Hitchcock v. 260
Rose, Mendoza v. 241
Rosenberg v. Germania Bank. 233
Roth Clothing Co. v. Maine Steamship Co. 237
Ryder, Cullin v. 485

S.

Sanders v. People's Co-operative Ice Co. 171
Schenectady R. Co. v. Lyon... 275
Schenectady R. Co. v. United Traction Co. 282
Schieck v. Donohue 425
Schwoerer v. Connolly 222
Security Trust Life Ins. Co., Raymond v. 31
Segal, Hyman v. 226
Shandley v. Levine 23
Shepherd, Wright v. 454
Slattery v. McCaw 426
Smith, Bowne v. 575
Smith v. Dunn 288
Smith v. Havens Relief Fund Society 594
Smith, Matter of 384
Smith, People v. 379
Smith, United Gold & Platinum Mines Co. v. 567
Southold Savings Bank v. Board of Education 74
Spencer, Waters v. 15
Spring v. Millington 624
Stein v. Marks 140
Stein, People ex rel. v. Keeper of State Reformatory 122
Stiles, Thompson v. 334
Swan v. Swan 163
Syracuse Land & Steamboat Co., McDowell v. 627

T.

PAGE.

Tanner v. Ranken 488
Thaney v. Friederick & Sons Co. 134
Thompson v. Stiles 334
Totten, Lattan v. 116
Town of Fayette v. Greenleaf. 352
Town of Hadley, Matter of.. 265
Town of Long Lake, Reid v... 370
Town of Wilmurt, Wright v.. 456
Townsend, Matter of 415
Truesdell v. Winne 451
Tuttle v. First National Bank. 318

U.

Uhlfelder v. Palatine Ins. Co. 153
United Gold & Platinum Mines Co. v. Smith 567
United States Trust Co., Phalen v. 57
United Traction Co., Schenectady R. Co. v. 282
Utica & Mohawk Valley R. Co., Evans v. 345

V.

Vandewater v. Mutual Reserve Life Ins. Co. 316
Van Vechten, Baird v. 279

W.

Wallis, Harrison v. 492
Warden of City Prison, People ex rel. Reynolds v. 149
Waters v. Spencer 15
Webb, Whipple v. 332
Westbrook, Matter of 339
Westminster Presbyterian Ch. v. Findley 173
Whipple v. Webb 332
Willard, Glascoe v. 166
Winne, Truesdell v. 451
Woodend, Johnson v. 524
Wright v. Shepherd 454
Wright v. Town of Wilmurt. 456
Wright Steam Engine Works v. New York Kerosene O. E. Co. 580
Wyckoff, McAfee v. 380

Y.

Young v. American Bank (Action No. 1) 305
Young v. American Bank (Action No. 2) 308
Young, Matter of 521

Z.

Zabor, People v. 633
Zeiser v. Cohn 462

Digitized by Google

TABLE OF CASES CITED.

A.

		PAGE.
Abbott v. American Hard Rubber Co.	33 Barb. 578	43
Adair v. Brimmer	74 N. Y. 539	185
Adams v. Hopkins	5 Johns. 252	421
Adams v. New Jersey Steamboat Co.	151 N. Y. 163	231
Adams v. New York	192 U. S. 585	551
Agnew v. Lichten	19 Bradw. 79	19
Akin v. Meeker	78 Hun, 387	54
Albany Belting & Supply Co. v. Grell	67 App. Div. 81	16
Alexander v. Alexander	26 Nebr. 68	501
Allen v. Allen	8 Abb. N. C. 175	323
Altmann v. Benz	27 N. J. Eq. 331	145
Amato v. Jacobus	58 Fed. Repr. 856	421
Ames v. French	83 App. Div. 452	590
Amherst College v. Ritch	151 N. Y. 282	614
Ancient City Sportsman's Club v. Miller	7 Lans. 412	423
Andrews v. Herriot	4 Cow. 508	17
Andrews v. Schofield	27 App. Div. 90	311
Anonymous	15 Abb. Pr. (N. S.) 307	323
Appleton v. Warner	51 Barb. 270	328
Armstrong v. Kennedy	23 Misc. Rep. 47	358
Arndt v. Griggs	134 U. S. 316	496
Arnold v. Angell	62 N. Y. 508	294
Arnold v. Treviranus	78 App. Div. 589	519
Atkinson v. Duffy	16 Minn. 45	500
Atlantic & Pacific Telegraph Co. v. Baltimore & Ohio R. R. Co.	14 J. & S. 377	288
Attorney-General v. Guardian M. L. Ins. Co.	77 N. Y. 275	37
Attorney-General v. Shepard	62 N. H. 383	258

B.

Bain v. Bain	2 Add. 253	325
Baird v. Helfer	42 N. Y. Supp. 484	455
Baird v. United States	96 U. S. 430	273
Baker v. Brown	64 Hun, 627	271
Baker v. Dening	8 Ad. & El. 94	235
Baker v. Home Life Ins. Co.	64 N. Y. 648	482
Banta v. Wood	32 Iowa, 469	501
Barnes v. Henshaw	21 Wend. 426	424
Barnes v. Quigley	59 N. Y. 265	473
Barone v. O'Leary	44 App. Div. 418	165
Barteau v. Phœnix Mutual Life Ins. Co.	67 N. Y. 595	480
Barth v. Iroquois Furnace Co.	63 Ill. App. 323	17

Digitized by Google

		PAGE
Bartlett v. Bartlett	1 Clarke Ch. 460	323
Bassett v. Spofford	45 N. Y. 387	406
Bath Gas Light Co. v. Claffy	151 N. Y. 24	51
Baucus v. Barr	45 Hun, 582; affd., 107 N. Y. 624	338
Baucus v. Stover	89 N. Y. 1	338
Baxter v. McDonnell	154 N. Y. 432; 155 id. 83..49,	143
Beagle v. Cable	55 App. Div. 155	382
Beaver v. Beaver	117 N. Y. 421 104,	112
Beers v. Washbond	86 App. Div. 582	336
Belton v. Hatch	109 N. Y. 593	145
Beman v. Douglas	1 App. Div. 169	521
Beman v. Todd	124 N. Y. 114	25
Bendernagle v. Cocks	19 Wend. 207	273
Bengivenga v. Brooklyn Heights R. R. Co.	48 App. Div. 515	201
Benson v. Corbin	145 N. Y. 351	10
Bevan v. Cooper	72 N. Y. 327	71
Bird v. Merklee	144 N. Y. 544	613
Bissell v. M. S. & N. I. R. R. Co.	22 N. Y. 258	50
Black River & U. R. R. Co. v. Barnard	31 Barb. 258	610
Blackwell v. First Nat. Bank of Albuquerque	10 N. M. 555	502
Blair v. Wait	69 N. Y. 113	482
Blaut v. Blaut	41 Misc. Rep. 572	301
Bloodgood v. Bloodgood	59 How. Pr. 42	327
Boardman v. Lake Shore & M. S. R. Co.	84 N. Y. 157	208
Boisnot v. Wilson	N. Y. L. J., July 15, 1904	588
Boughton v. Flint	74 N. Y. 476	311
Bowe v. United States Reflector Co.	36 Hun, 407	420
Boynton v. Squires	85 Hun, 128	333
Brackett v. Barney	28 N. Y. 340	462
Bradner v. Faulkner	93 N. Y. 515	303
Brainerd v. White	12 Abb. N. C. 407	25
Brass v. Rathbone	153 N. Y. 435 167,	412
Breed v. Ruoff	54 App. Div. 142	298
Brick v. Brick	66 N. Y. 144	189
Brigg v. Hilton	99 N. Y. 517	213
Brooklyn El. R. R. Co. v. City of Brooklyn	2 App. Div. 98	539
Brown v. Brown	40 Hun, 418	405
Brown v. Butchers & Drovers' Bank	6 Hill, 443	235
Brown v. District of Columbia	127 U. S. 579	257
Brown v. Quintard	177 N. Y. 75, 159 605,	614
Brown v. Root Mfg. Co.	148 N. Y. 294	27
Brown v. Stebbins	4 Hill, 154	49
Bruen v. Gillet	115 N. Y. 10	182
Buck v. Colbath	3 Wall. 334	508
Buckhout v. Rall	28 Hun, 484	84
Bull v. Odell	19 App. Div. 605	618
Burnes v. Burnes	61 Mo. App. 612	500
Burnham v. Walkup	54 N. Y. 656	473
Bush v. Board of Supervisors	159 N. Y. 212	528
Bush v. Lathrop	22 N. Y. 535	161
Butler v. Manhattan R. Co.	143 N. Y. 417	113
Byxbie v. Wood	24 N. Y. 607	584

Digitized by Google

C.

		PAGE.
Calvert v. Calvert	15 Colo. 390	501
Camp v. Garr	6 Wend. 535	422
Campbell v. Cothran	56 N. Y. 279	421
Cantrell v. Fowler	24 S. C. 424	566
Carpenter v. N. Y., N. H. & H. R. R. Co.	124 N. Y. 53	231
Cassidy v. Hall	97 N. Y. 159	295
Cassidy v. Uhlmann	170 N. Y. 537	472
Castle v. Parker	17 Law Rep. (N. S.) 367	138
Catoosa Springs Co. v. Linch	18 Misc. Rep. 209	99
Central Nat. Bank v. Stevens	144 N. Y. 50; 169 U. S. 432	507
Central Trust Co. v. New York City & N. R. R. Co.	18 Abb. N. C. 381	573
Central Trust Co. v. West India Imp. Co.	169 N. Y. 314	161
Chamberlain v. Chamberlain	43 N. Y. 424	532
Chase v. Chase	95 N. Y. 381	400
Children's Society v. Loveridge	70 N. Y. 387	189
Choisser v. Young	69 Ill. App. 256	298
City of Buffalo v. Holloway	7 N. Y. 493	137
City of New York v. McCaldin Bros. Co.	81 App. Div. 622; affd., 176 N. Y. 588	511
City of Rochester v. Quintard	136 N. Y. 221	368
City of Rochester v. West	164 N. Y. 510	114
City of Syracuse v. Benedict	86 Hun, 343; 67 N. Y. St. Repr. 614	277
Clapp v. Hawley	97 N. Y. 610	19
Clark v. Mosher	107 N. Y. 118	317
Clark v. N. Y. C. & H. R. R. R. Co.	4 App. Div. 331	548
Clemans v. Supreme Assembly Royal Society of Good Fellows	131 N. Y. 485	480
Clemens v. American Fire Ins. Co.	70 App. Div. 435	219
Clyde & Rose Plank Road Co. v. Baker	12 How. Pr. 371	87
Cochrane v. Schell	140 N. Y. 516	617
Colby v. Colby	81 Hun, 221	62
Colby v. Town of Day	75 App. Div. 211	457
Cole v. Millerton Iron Co.	133 N. Y. 164	40
Colman v. Shattuck	62 N. Y. 31	390
Colon v. Lisk	153 N. Y. 188	368
Commercial Wood & Cement Co. v. Northampton Portland Cement Co.	91 App. Div. 614	421
Commonwealth v. Kingsbury	5 Mass. 106	95
Commonwealth v. Walther	109 Mass. 309	95
Conaughty v. Nichols	42 N. Y. 83	584
Connelly v. O'Brien	166 N. Y. 406	10
Converse v. Walker	30 Hun, 596	274
Cook v. Nellis	18 N. Y. 126	87
Cooper v. Newell	173 N. Y. 555	496
Coplay Iron Co. v. Pope	108 N. Y. 232	215
Corning v. Smith	6 N. Y. 82	315
Cosulich v. Standard Oil Co.	122 N. Y. 126	137
Cottle v. Marine Bank	166 N. Y. 53	311
Crain v. Wright	36 Hun, 74; 114 N. Y. 307	439
Creamer v. Mitchell	162 N. Y. 477	382

Digitized by Google

		PAGE.
Crescent City Live Stock Co. v. Butchers' Union	120 U. S. 141	508
Crocker v. Crocker	31 N. Y. 507	161
Croft v. Williams	88 N. Y. 384	183
Cromwell v. MacLean	123 N. Y. 489	398
Croninger v. Crocker	62 N. Y. 151	383
Cudney v. Cudney	68 N. Y. 152	189
Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co	30 Barb. 159	413
Cunningham v. Davenport	147 N. Y. 43	116
Curry v. Fowler	87 N. Y. 33	295
Curry v. Powers	70 N. Y. 212	104
Cushman v. United States Life Ins. Co.	63 N. Y. 404	480
Cutler v. Wright	22 N. Y. 472	493
Cutter v. Morris	116 N. Y. 310	333

D.

Dains v. Prosser	32 Barb. 290	408
Darling v. Pierce	15 Hun, 543	452
Davies v. Austin	1 Ves. 247	161
Davis v. Huston	15 Nebr. 28	501
Davis v. Kerr	3 App. Div. 322	182
Davis v. Westervelt	38 Misc. Rep. 13	45
Davis Machine Co. v. Robinson	41 Misc. Rep. 329	288
Day v. Day	94 N. Y. 153	435
Decker v. Myles	4 Colo. 558	501
Defendorf v. Defendorf	43 App. Div. 166	315
Degraw v. Elmore	50 N. Y. 1	472
Delafield v. Shipman	103 N. Y. 463	10
Del Genovese v. Third Ave. R. R. Co.	13 App. Div. 412	557
De Luka v. Goodwin	142 N. Y. 194	382
Denton v. Carroll	4 App. Div. 532	626
De Puy v. Stevens	37 App. Div. 289	105
Desmond v. Crane	39 App. Div. 190	359
Dever v. Hagerty	43 App. Div. 354	396
Diapolo v. Third Ave. R. R. Co.	55 App. Div. 566	201
Dolan v. N. D. & C. R. R. Co.	120 N. Y. 571	347
Dolliver v. American-Swan Boat Co.	32 Misc. Rep. 264	269
Dougherty v. Thompson	167 N. Y. 483	10
Douglass v. Phenix Ins. Co.	138 N. Y. 209	208
Downes v. Phœnix Bank	6 Hill, 297	311
Driggs v. Phillips	103 N. Y. 77	428
Duclos v. Benner	136 N. Y. 560	79
Dudley v. Scranton	57 N. Y. 424	473
Duncomb v. N. Y., H. & N. R. R. Co.	84 N. Y. 190	573
Dunning v. Dunning	37 Ill. 306	19
Dunstan v. Higgins	138 N. Y. 70	19
Duntz v. Granger Brewing Co.	41 Misc. Rep. 177	314
Dupuy v. Wurtz	53 N. Y. 571	502
Dwight v. Germania Life Ins. Co.	84 N. Y. 493	165

E.

Early v. Doe	16 How. (U. S.) 610	502
Eastern Brewing Co. v. Feist	21 Misc. Rep. 681	488

Digitized by Google

		PAGE.
Eddy v. Co-operative Dress Assn..	3 Civ. Pro. 442	38
Eddy v. London Assur. Corp.....	143 N. Y. 311	155
Edson v. Bartow	154 N. Y. 199	614
Eising v. Young	38 Misc. Rep. 12	45
Electric Construction Co. v. Hefferman	34 N. Y. St. Repr. 436	288
Elkin v. People	28 N. Y. 177	95
Elwood v. Western Union Tel. Co.	45 N. Y. 549	626
Esselstyn v. Union Surety & Guaranty Co.	82 App. Div. 474	420
Evans v. Harris	47 N. Y. Super. Ct. 366	336
Excelsior Fire Ins. Co. v. Royal Ins. Co.	55 N. Y. 359	155

F.

Fairbank Canning Co. v. Metzger.	118 N. Y. 260	214
Fairbanks v. Sargent	104 N. Y. 108	161
Fallon v. Kelehar	16 Hun, 266	563
Farleigh v. Cadman	159 N. Y. 169	117
Farrar v. Lee	10 App. Div. 130	208
Fay v. Supreme Tent	38 Misc. Rep. 427	147
Feneran v. Singer Mfg. Co.	20 App. Div. 574	210
Fenwick v. Mitchell	34 Misc. Rep. 617	269
First Nat. Bank v. Clark	134 N. Y. 368	307
First Nat. Bank v. National Broadway Bank	156 N. Y. 472	17
First Reformed Presbyterian Church v. Bowden	14 Abb. N. C. 356	174
Fischer v. Langbein	31 Hun, 272	278
Fischer-Hansen v. Brooklyn Heights R. R. Co.	173 N. Y. 492	269
Foot v. Ætna Life Ins. Co.	61 N. Y. 571	480
Fouts v. Mann	15 Nebr. 172	500
Fox v. Abel	2 Conn. 541	499
Frace v. N. Y., L. E. & W. R. R. Co.	143 N. Y. 182	263
Freeman v. Grant	132 N. Y. 22	474
Freeman v. Howe	24 How. 450	508
Frost v. Beekman	1 Johns. Ch. 288	371

G.

Gall v. Gall	114 N. Y. 109	330
Gardner v. Lansing	28 Hun, 413	315
Gaylord Mfg. Co. v. Allen	53 N. Y. 515	215
Genet v. Hunt	113 N. Y. 158	534
Gildersleeve v. Landon	73 N. Y. 609	488
Gilman v. Tucker	128 N. Y. 190	308
Glacius v. Fogel	88 N. Y. 434	182
Glascoe v. Willard	44 Misc. Rep. 166	412
Goddard v. Pardee Medicine Co..	52 Hun, 85	165
Good v. Daland	119 N. Y. 153	19
Goodwin v. Griffis	88 N. Y. 629	584
Gorman v. O'Connor	155 Pa. St. 239	145
Grattan v. Metropolitan Life Ins. Co.	92 N. Y. 274	480
Griffin v. Griffin	47 N. Y. 134	324
Gugel v. Isaacs	21 App. Div. 504	221
Guilford County v. Georgia Co.	109 N. C. 310	501
Gurney v. Atlantic & G. W. R. Co.	58 N. Y. 358	215

Digitized by Google

H.

		PAGE.
Haack v. Brooklyn Labor Lyceum Assn.	93 App. Div. 491	274
Habberton v. Habberton	58 Ill. App. 99	19
Hadley v. Mayor	33 N. Y. 603	477
Hall v. United States Reflector Co.	14 Wkly. Dig. 48; 95 N. Y. 648; 96 id. 629	589
Hallenborg v. Greene	66 App. Div. 590	412
Hamer v. Sidway	124 N. Y. 538	440
Hannon v. Cobb	49 App. Div. 480	298
Harris v. Elliott	163 N. Y. 269	169
Hartrung v. People	22 N. Y. 105	554
Hastings v. Westchester Fire Ins. Co.	73 N. Y. 146	155
Hatch v. Leonard	165 N. Y. 435	472
Hawley v. James	16 Wend. 60	617
Haywood v. Russell	44 Me. 252	501
Hecla Powder Co. v. Sigua Iron Co.	157 N. Y. 437	632
Heine v. Rohner	29 App. Div. 239	168
Hellenberg v. District No. 1, I. O. O. B.	94 N. Y. 580	145
Herbst v. Hagenaers	137 N. Y. 290	562
Hernandez v. Drake	81 Ill. 34	500
Herron v. Herron	28 Misc. Rep. 323	323
Hess v. Johnson	41 App. Div. 465	145
Hess v. New York Press Co.	26 App. Div. 73	302
Hess v. Sloane	47 App. Div. 585	549
Heye v. Tilford	2 App. Div. 346; affd., 154 N. Y. 757	294
Higgins v. Sharp	164 N. Y. 4	324
Hoagland v. Culvert	20 N. J. L. 387	195
Hoffman v. King	160 N. Y. 618	264
Holmes v. Carley	31 N. Y. 289	437
Holmes v. Moffat	120 N. Y. 159	389
Holmes v. Roper	32 N. Y. St. Repr. 470	548
Hooper v. Story	155 N. Y. 171	214
Hopkins v. Clark	158 N. Y. 299	631
Hopper v. Hopper	92 Hun, 415	327
Hotchkiss v. Mosher	48 N. Y. 478	306
Howe & Hummel v. Schweinberg	4 Misc. Rep. 73	626
Howell v. Adams	68 N. Y. 314	311
Howell v. Chicago & Northwestern R. Co.	51 Barb. 378	413
Howell v. Taussig	12 Civ. Pro. 252	29
Howland v. Clendenin	134 N. Y. 305	10
Hunt v. Robinson	52 App. Div. 539	311
Hurd v. N. Y. & C. S. L. Co.	167 N. Y. 89	37
Huylar v. Cragin Cattle Co.	40 N. J. Eq. 392	515

I.

Industrial Bank v. Goldman	75 N. Y. 127	315
Iowa St. Sav. Bank v. Jacobson	8 S. Dak. 292	500
Irving v. Irving	90 Hun, 422; affd., 149 N. Y. 573	589

J.

Jacobs v. Northwestern Life Assurance Co.	30 App. Div. 285; affd., 164 N. Y. 582	481

Digitized by Google

		PAGE.
Jenkins v. Baker	36 Misc. Rep. 55; 77 App. Div. 509	117
Jessup v. Carnegie	80 N. Y. 441	503
Joel v. Ritterman	5 Redf. 136	338
Johnson v. Day	17 Pick. 106	499
Johnson v. Huber	134 Ill. 511	17
Johnson v. State	26 N. J. L. 313	94
Jones v. City of Buffalo	178 N. Y. 45	528
Jones v. Graham	77 N. Y. 628	483
Jones v. Walker	63 N. Y. 612	333
Judson v. Gray	11 N. Y. 408	422

K.

Kalish v. Kalish	166 N. Y. 377	534
Kavanagh v. Wilson	70 N. Y. 177	626
Keegan v. Smith	60 App. Div. 168; affd., 172 N. Y. 624	333
Keep v. Kaufman	56 N. Y. 332	471
Keister v. Rankin	34 App. Div. 288	542
Kelly v. Brownlow	54 N. Y. Super. Ct. 129	409
Kelly v. Home Savings Bank	44 Misc. Rep. 102	111
Kelly v. Waterbury	87 N. Y. 179	301
Kennedy v. Local Union No. 726	75 App. Div. 243	147
Kerby v. Clapp	15 App. Div. 37	314
Kilbourne v. Supervisors	137 N. Y. 170	149
Kimball v. St. Louis & S. F. R. Co.	157 Mass. 7	413
Knowles v. Summey	52 Miss. 377	501
Knowlton v. Knowlton	155 Ill. 158	501
Kring v. N. Y. C. & H. R. R. R. Co.	45 App. Div. 373	549

L.

Lafond v. Deems	81 N. Y. 508	145
Lang v. Ropke	5 Sandf. 363	617
Lansburgh v. Walsh	12 Misc. Rep. 124	205
Lapham v. Rice	55 N. Y. 472	435
Laramore v. Crown Point Iron Co.	101 N. Y. 394	137
Lawlor v. Magnolia Metal Co.	2 App. Div. 552	420
Leach v. Greene	116 Mass. 534	18
Leavitt v. Katzoff	43 Misc. Rep. 26; 86 N. Y. Supp. 495	227
Lefler v. Field	52 N. Y. 621	54
Leitch v. Wells	48 N. Y. 585	161
Leonard v. Columbia St. Nav. Co.	84 N. Y. 48	17
Lewis v. Smith	9 N. Y. 513	315
Lewis v. Wilson	121 N. Y. 284	143
Lindenmuller v. People	33 Barb. 548	498
Lodge v. Phelps	1 Johns. Cas. 139	17
Lomer v. Meeker	25 N. Y. 361	626
Long Island R. R. Co. v. Reilly	89 App. Div. 166	127
Loomis v. City of Little Falls	176 N. Y. 31	133
Loubat v. Le Roy	40 Hun, 546	144
Lowenstine v. Gillespie	6 Lea (Tenn.), 641	501
Lyman v. Young Men's Cosmopolitan Club	38 App. Div. 220	278
Lynch v. Murphy	161 N. Y. 247	496
Lyons v. Avis	5 App. Div. 193	202
Lyth & Sons v. Town of Evans	33 Misc. Rep. 221	457

Digitized by Google

M.

		PAGE.
M. v. C.	41 L. J. (N. S.) 40	325
Mack v. Phelan	92 N. Y. 20	488
MacMurray v. Gosney	106 Fed. Repr. 11	208
McCabe v. Fowler	84 N. Y. 389	185
McClure v. Wilson	13 App. Div. 274	471
McCormack v. Venable	34 N. Y. St. Repr. 717; affd., 133 N. Y. 536	488
McCreery v. Day	119 N. Y. 1	511
McDonald v. Mallory	77 N. Y. 546	17
McDowell v. Van Deusen & Delamater	12 Johns. 356	453
McElroy v. Albany Savings Bank	8 App. Div. 46	105
McElroy v. National Savings Bank	8 App. Div. 192	105
McEntee v. Kingston Water Co.	165 N. Y. 27	288
McFadden v. Murphy	149 Mass. 341	145
McFarland v. Crary	6 Wend. 298	257
McGibbon v. Baxter	51 Hun, 587	262
McGiffin v. Baird	62 N. Y. 329	54
McGinnis v. Watson	41 Pa. St. 9	144
McGrath v. Michaels	80 App. Div. 458	210
McHenry v. Jewett	90 N. Y. 58	167, 411
McKenzie v. Industrial Federation	N. Y. L. J., Dec. 22, 1903	421
McMahon v. Howe	40 Misc. Rep. 546	241
McMichael v. Kilmer	76 N. Y. 36	473
McMullen v. Berean	29 Misc. Rep. 443	380
McVeany v. Mayor	80 N. Y. 185	527
Maltbie v. Belden	167 N. Y. 307	140
Manhattan Co. v. Laimbeer	108 N. Y. 578	371
Manhattan Life Ins. Co. v. Gosford	3 Misc. Rep. 569	225
Manhattan R. Co. v. Mayor	89 Hun, 429	539
Marando v. Gillespie Co.	54 App. Div. 488	45
March v. People	7 Barb. 391	93
Market Nat. Bank v. Pacific Nat. Bank	89 N. Y. 397	501
Marling v. Robrecht	13 W. Va. 440	501
Marston v. Gould	69 N. Y. 220	294
Martin v. Aluminum Plate Co.	44 App. Div. 412	311
Martin v. City of New York	82 App. Div. 35; affd., 176 N. Y. 371	527, 578
Martin v. Hawkins	62 Ark. 421	501
Mason v. Henry	152 N. Y. 537	36
Masterson v. Townshend	123 N. Y. 458	208
Masury v. Whiton	111 N. Y. 679	557
Matter of Battle	5 Dem. 447	339
Matter of Blum	9 Misc. Rep. 571	268
Matter of Bolin	136 N. Y. 177	105
Matter of Bolton	159 N. Y. 134	71
Matter of Bradley	141 N. Y. 527	252
Matter of Brenner	67 App. Div. 375; 170 N. Y. 185	253
Matter of Brez	172 N. Y. 609	78
Matter of Bridgford	65 Hun, 227	133
Matter of Brooklyn Union El. R. R. Co.	176 N. Y. 213	277
Matter of Brunor	19 Misc. Rep. 203	189
Matter of Chabot	44 App. Div. 340; affd., 167 N. Y. 280	191

Digitized by Google

		PAGE.
Matter of City of Rochester v. Bloss	77 App. Div. 28; affd., 173 N. Y. 646	366
Matter of Davenport	67 App. Div. 194	443
Matter of Davis	149 N. Y. 539	409
Matter of De Camp	151 N. Y. 557	197
Matter of Dudley	33 App. Div. 465	252
Matter of Dunham's Will	1 N. Y. Supp. 120	189
Matter of Eggleston	51 App. Div. 38	383
Matter of Executive Communication	14 Fla. 277	195
Matter of Foley	8 Misc. Rep. 196	252
Matter of Guardian Mut. Life Ins. Co.	13 Hun, 115; affd., 74 N. Y. 617	38
Matter of Haebler v. New York Pro. Exch.	149 N. Y. 414	143
Matter of Havens	6 Dem. 456	614
Matter of Hawley	104 N. Y. 262	71
Matter of Hoagland	79 App. Div. 56	185
Matter of Holmes	79 App. Div. 267; affd., 176 N. Y. 604	339
Matter of Hoyt	37 Misc. Rep. 720	76
Matter of Huber's Estate	83 N. Y. Supp. 772	191
Matter of Johnson	6 Dem. 146	76
Matter of Johnson	42 Misc. Rep. 651	183
Matter of Lawton	22 Misc. Rep. 426	196
Matter of McMahon	28 Misc. Rep. 697	77
Matter of McMahon	67 How. Pr. 113; affd., 1 How. Pr. (N. S.) 270	512
Matter of Meehan	59 App. Div. 156	105
Matter of Metcalf's Will	16 N. Y. 180	189
Matter of Miller	9 App. Div. 260	197
Matter of Mueller	15 App. Div. 67	623
Matter of Newcombe	45 N. Y. St. Repr. 806	453
Matter of New York Central & H. R. R. R. Co.	70 N. Y. 191	396
Matter of New York, West Shore & B. R. Co.	28 Hun, 505	278
Matter of Ockershausen	59 Hun, 200	338
Matter of O'Connell	33 App. Div. 483	103
Matter of O'Hara	63 App. Div. 514; 95 N. Y. 403	389, 614
Matter of Phipps	77 Hun, 325; affd., 143 N. Y. 644	191
Matter of Powers	34 Misc. Rep. 636	389
Matter of Prospect Park & Coney Island R. R. Co.	67 N. Y. 371	277
Matter of Provost	87 App. Div. 90	182
Matter of Pye	18 App. Div. 306; affd., 154 N. Y. 773	339
Matter of Rappleye	43 App. Div. 84; 161 N. Y. 615	515
Matter of Rice	81 App. Div. 223; 176 N. Y. 570	67
Matter of Rogers	161 N. Y. 108	321
Matter of Rohe's Will	22 Misc. Rep. 415; 50 N. Y. Supp. 392	190
Matter of Rupp & Curtiss	33 App. Div. 468	113
Matter of Sells	15 App. Div. 571	252

Digitized by Google

		PAGE.
Matter of Siegrist	11 Misc. Rep. 188; affd., 1 App. Div. 615	189
Matter of Snelling	136 N. Y. 515	189
Matter of Snyder	34 Hun, 302; affd., 103 N. Y. 178	339
Matter of Spratt	4 App. Div. 1	190
Matter of Snelling	84 Hun, 514	190
Matter of Taxpayers of Kingston	15 Barb. 657	612
Matter of Tompkins	154 N. Y. 634	10
Matter of Town of Hempstead	36 App. Div. 321	266
Matter of Tracy	87 App. Div. 215	76
Matter of Vanderbilt	172 N. Y. 69	77
Matter of Weidenfeld	84 App. Div. 235; affd., 176 N. Y. 562	148
Matter of Wilkins	169 N. Y. 494	557
Matter of Williams' Will	15 N. Y. Supp. 828	189
Matthews v. Cady	61 N. Y. 651	474
Mattice v. Wilcox	147 N. Y. 624	302
May v. Traphagen	139 N. Y. 478	396
Mayer v. Mayor	101 N. Y. 284	133
Mayor v. Brady	115 N. Y. 599	72
Mayor v. Cunliff	2 N. Y. 172	137
Mead v. Maben	131 N. Y. 255	10
Meech v. Stoner	19 N. Y. 26	243
Meo v. Meo	2 N. Y. Supp. 569	323
Mercantile Nat. Bank v. Mayor	172 N. Y. 35	512
Merchants' Loan & Trust Co. v. Clair	36 Hun, 362	17
Merritt v. Village of Portchester	71 N. Y. 309	306
Metropolitan Bank v. Van Dyck	27 N. Y. 400	612
Michaels v. Fishel	169 N. Y. 381	241
Miller v. Brown	56 N. Y. 383	196
Miller v. Phœnix Mutual Life Ins. Co.	107 N. Y. 292	482
Mills v. Bliss	55 N. Y. 139	24
Miner v. Galvanotype Engraving Co.	30 Misc. Rep. 200	217
Monroe v. Douglas	4 Sandf. Ch. 126	496
Monson v. New York Security & Trust Co.	140 N. Y. 498	79
Montgomery v. Boyd	70 App. Div. 64	71
Moody v. Becker	70 N. Y. Supp. 543	455
Moore v. Lyons	25 Wend. 119	10
Morehouse v. Brooklyn Heights R. R. Co.	43 Misc. Rep. 414	269
Morgan v. Bennett	44 App. Div. 323	303
Morris v. Hays	14 App. Div. 8	455
Morris v. Hofferberth	81 App. Div. 512	236
Morris v. Patchin	24 N. Y. 394	18
Mott v. Consumers' Ice Co.	73 N. Y. 543	209
Mowry v. Blandin	64 N. H. 3	501
Mulcahey v. Emigrant Industrial Savings Bank	89 N. Y. 436	624
Munger v. Albany City Nat. Bank	85 N. Y. 581	311
Murphy v. Commonwealth	172 Mass. 264	554
Murphy v. Jack	142 N. Y. 215	311
Myers v. Becker	95 N. Y. 486	169

Digitized by Google

N.

		PAGE.
Nanz v. Oakley	120 N. Y. 84; 122 id. 631..	16, 182
National Wall Paper Co. v. Sire..	163 N. Y. 122	632
Neftel v. Lightstone	77 N. Y. 96	584
Neudecker v. Kohlberg	81 N. Y. 296	472
Neuendorff v. Duryea	69 N. Y. 557	498
Newton v. Porter	69 N. Y. 133	405
New York & Brooklyn Ferry Co. v. Moore	18 Abb. N. C. 108; affd., 102 N. Y. 667	405
New York Cement Co. v. Consolidated R. C. Co.	178 N. Y. 167	115
New York Investment Co. v. Cosgrove	47 App. Div. 35	314
New York Life Ins. Co. v. Fletcher.	117 U. S. 519	483
New York & N. H. R. R. Co. v. Schuyler	34 N. Y. 30	236
North v. North	1 Barb. Ch. 241	326

O.

Oakley v. Aspinwall	3 N. Y. 549	452
Oakley v. Healey	38 Hun, 244	396
O'Brien v. Fitzgerald	143 N. Y. 377	471
O'Brien v. Grant	146 N. Y. 163	145
O'Brien v. Home Benefit Society..	117 N. Y. 310	481
O'Brien v. Jones	91 N. Y. 193	54
O'Brien v. National Conduit & Cable Co.	43 Misc. Rep. 327	420
Ocean Nat. Bank v. Olcott	46 N. Y. 12	519
O'Connor v. Union R. Co	67 App. Div. 99	203
Olcott v. Robinson	21 N. Y. 150	501
Oregon R. & N. Co. v. Oregonian R. Co.	130 U. S. 1	147
Ormiston v. Olcott	84 N. Y. 339	185
Ostrom v. Greene	161 N. Y. 353	490
Otis v. Dodd	90 N. Y. 336	632
Ousterhout v. Day	9 Johns. 114	422

P.

Palmer v. City of Syracuse	67 App. Div. 270	133
Palmer v. New York News Pub. Co.	31 App. Div. 210	302
Pardee v. Fish	60 N. Y. 265	311
Park & Sons Co. v. National Wholesale Druggists' Assn.	30 App. Div. 508	497, 580
Parkhurst v. Rochester Mach. Co..	65 Hun, 489	85
Parks v. Morris Axe & Tool Co..	54 N. Y. 586	214
Paulding v. Sharkey	88 N. Y. 432	182
Payne v. Gardiner	29 N. Y. 146	311
Peck v. Jenness	7 How. 612	508
Pelham Hod Elevating Co. v. Baggaley	12 N. Y. Supp. 218	581
Pennoyer v. Neff	95 U. S. 714	566
People v. Adams	85 App. Div. 390; 176 N. Y. 351	551
People v. American Steam Boiler Ins. Co.	147 N. Y. 25	38
People v. Ballard	134 N. Y. 294	42

Digitized by Google

		PAGE.
People v. Batchelor	22 N. Y. 128	143
People v. Benefit Soc. of Operative Masons	3 Hun, 361	147
People v. Bowen	30 Barb. 24; affd., 21 N. Y. 517	612
People v. Buell	85 App. Div. 141	470
People v. Connor	46 Barb. 336	196
People v. Dennin	35 Hun, 327	121
People v. Dewey	23 Misc. Rep. 267	498
People v. Doody	34 Misc. Rep. 463	380
People v. Everest	51 Hun, 19	92
People v. Glen	64 App. Div. 167; affd., 173 N. Y. 395	350
People v. Glennon	37 Misc. Rep. 1; 175 N. Y. 45.	5
People v. Hagadorn	36 Hun, 610	396
People v. Havnor	149 N. Y. 195 113,	498
People v. Johnson	10 N. Y. Crim. 531	94
People v. Koerner	154 N. Y. 376	380
People v. Loan Co.	177 N. Y. 231	35
People v. McKane	31 Abb. N. C. 176; 143 N. Y. 455	95
People v. Mather	4 Wend. 230	93
People v. Medical Society	24 Barb. 570	146
People v. Miller	81 App. Div. 255	639
People v. Moses	140 N. Y. 214 ..... 113, 121,	498
People v. New York Commercial Assn.	18 Abb. Pr. 271	145
People v. Petersen	15 N. Y. Crim. 421	94
People v. Pillion	78 Hun, 74	639
People v. Rutherford	47 App. Div. 209	350
People v. St. Franciscus Ben. Soc.	24 How. Pr. 216	147
People v. Schooley	149 N. Y. 99	380
People v. Summers	40 Misc. Rep. 384	5
People v. Utica Ins. Co.	15 Johns. 358	147
People v. Wicks	11 App. Div. 545	96
People v. Willis	14 N. Y. Crim. 414; 24 Misc. Rep. 537	93
People v. Wood	121 N. Y. 522	584
People ex rel. Bailey v. Supervisors of Greene Co.	12 Barb. 217	476
People ex rel. Balcom v. Mosher	163 N. Y. 32	368
People ex rel. Bevins v. Supervisors of Greene Co.	82 Hun, 298 197,	457
People ex rel. Bishop v. Palen	74 Hun, 292	195
People ex rel. Bowles v. Burrell	14 Misc. Rep. 217	457
People ex rel. Bungart v. Wells	57 App. Div. 140	151
People ex rel. Burroughs v. Brinkerhoff	68 N. Y. 259	365
People ex rel. Caffrey v. Mosso	30 Misc. Rep. 164	389
People ex rel. Callahan v. Board of Education	174 N. Y. 169	12
People ex rel. Chappel v. Lindenthal	79 App. Div. 43; 173 N. Y. 524	530
People ex rel. Clark v. Keeper of State Reformatory	38 Misc. Rep. 241; 176 N. Y. 465	125
People ex rel. Clint v. Hamilton	27 Misc. Rep. 360	449
People ex rel. Collins v. Spicer	99 N. Y. 225	409
People ex rel. Corscadden v. Howe	177 N. Y. 499	364

Digitized by Google

		PAGE.
People ex rel. Danziger v. P. E. House of Mercy	128 N. Y. 180	151
People ex rel. D., L. & W. R. Co. v. County Court	92 Hun, 13	194
People ex rel. Deverell v. Musical M. P. Union	118 N. Y. 101	143
People ex rel. Dilcher v. German U. Ev. Ch.	53 N. Y. 103	146
People ex rel. Everett v. Board of Supervisors	93 N. Y. 397	457
People ex rel. Fairchild v. Preston	140 N. Y. 549	607
People ex rel. Fiske v. Devermann.	83 Hun, 181	477
People ex rel. Francis v. Common Council	78 N. Y. 33	477
People ex rel. Frank v. Davis	80 App. Div. 448	125, 151
People ex rel. Frank v. Keeper of State Reformatory	38 Misc. Rep. 233	125
People ex rel. Gaige v. Reardon	49 Hun, 425	476
People ex rel. Gaynor v. McKane.	78 Hun, 154	411
People ex rel. Guibord v. Kellogg.	22 App. Div. 176	266
People ex rel. Hanford v. Thayer.	88 Hun, 136	196
People ex rel. Havron v. Dalton.	85 App. Div. 110	273
People ex rel. Hirsh v. Wood	148 N. Y. 147	449
People ex rel. Hovey v. Town Clerk	26 Misc. Rep. 220	389
People ex rel. Johnson v. New York Pro. Exch.	149 N. Y. 401	144
People ex rel. Kingsley v. Pratt.	22 Hun, 300	268
People ex rel. Leonard v. Hamilton	42 App. Div. 212	448
People ex rel. Lower v. Donovan.	135 N. Y. 76	509
People ex rel. McLaughlin v. Police Commissioners	174 N. Y. 450	578
People ex rel. Millard v. Chapin.	104 N. Y. 96	477
People ex rel. Ottman v. Commissioners	37 App. Div. 248	196
People ex rel. Peterson v. Clark.	45 App. Div. 65	457
People ex rel. Roe v. Suffolk Common Pleas	18 Wend. 550	452
People ex rel. Ruggles v. Chapman	64 N. Y. 557	38
People ex rel. Ryan v. Wells	86 App. Div. 270; 176 N. Y. 462	530
People ex rel. Sims v. Collier	175 N. Y. 196	579
People ex rel. Smith v. Allen	37 App. Div. 248	136
People ex rel. Smith v. Foster	27 Misc. Rep. 567	449
People ex rel. Smith v. Keeper of State Reformatory	38 Misc. Rep. 243	125
People ex rel. Smith v. Schiellein.	95 N. Y. 133	476
People ex rel. Smith v. Van de Carr	86 App. Div. 9	151
People ex rel. Stevens v. Hayt	66 N. Y. 606	476
People ex rel. Stout v. Chapman.	5 Hun, 222	39
People ex rel. Sturgis v. Fallon.	152 N. Y. 1	244
People ex rel. Taylor v. Forbes	143 N. Y. 219	151
People ex rel. Wooster v. Maher.	141 N. Y. 335	428
Perlman v. Gunn	41 Misc. Rep. 166	83
Peters v. United States Industrial Ins. Co.	10 App. Div. 533; affd., 154 N. Y. 758	481

Digitized by Google

		PAGE.
Peyser v. Coney Island & Brooklyn R. R. Co.	81 Hun, 77	548
Phelps v. Delmore	26 N. Y. Supp. 279	548
Pierson v. Crooks	115 N. Y. 539	383
Plumb v. Cattaraugus Ins. Co.	18 N. Y. 392	482
Plummer v. International Power Co.	88 App. Div. 455	420
Polhemus v. Polhemus	43 Misc. Rep. 141; 88 N. Y. Supp. 273	576
Pollock v. Pennsylvania Iron Works	157 N. Y. 699	632
Pomeranz v. Marcus	40 Misc. Rep. 442	269
Pond v. Metropolitan El. R. Co.	112 N. Y. 188	430
Pool v. Milwaukee Mechanics' Ins. Co.	91 Wis. 530	100
Pope v. Allis	115 U. S. 363	383
Post v. Mason	91 N. Y. 539	190
Pritchard v. Norton	106 U. S. 124	17
Pulling v. People	8 Barb. 387	498
Purdy v. Lynch	145 N. Y. 462	182

R.

Radley v. Kuhn	97 N. Y. 26	617
Raynor v. Brennan	40 Hun, 60	471
Rector of St. James' Church v. Huntington	82 Hun, 125	175
Reed v. McConnell	13 N. Y. 425	472
Reformed Church v. Brown	54 Barb. 191	273
Reis v. Rohde	34 Hun, 161	490
Reynolds v. Reynolds	45 L. J. (N. S.) 89	325
Rice v. Coutant	38 App. Div. 543	18, 496
Rich v. Sargent Granite Co.	23 Civ. Pro. 361	37
Richardson v. Hughitt	76 N. Y. 55	295
Riggs v. Carter	77 App. Div. 580	298
Riggs v. Cragg	89 N. Y. 479	71
Riggs v. Johnson County	6 Wall. 166	508
Rio Grande R. R. Co. v. Gomila	132 U. S. 478	508
Ripley v. Ætna Ins. Co.	30 N. Y. 136	480
Roberts v. Jenkins	52 App. Div. 491	45
Robertson v. McCarty	54 App. Div. 103	623
Robinson v. Town of Fowler	80 Hun, 101	457
Rogers v. Common Council of Buffalo	123 N. Y. 173	195
Roosevelt v. Carow	6 Barb. 195	462
Ross v. Mather	51 N. Y. 108	473
Rothschild v. Mack	115 N. Y. 1	56, 584
Roulston v. Clark	3 E. D. Smith, 366	138
Rowley v. Empire Ins. Co.	36 N. Y. 550	482
Ruggles v. Chapman	1 Hun, 324; affd., 59 N. Y. 163	38
Rutty v. Consolidated Fruit Jar Co.	52 Hun, 492	474
Ryan v. N. Y. C. R. R. Co.	35 N. Y. 210	263

S.

St. Vincent Orphan Asylum v. City of Troy	76 N. Y. 114	428
Salisbury v. Howe	87 N. Y. 128	473
Salter v. Ham	31 N. Y. 321	294

Digitized by Google

		PAGE.
Sanders v. Ader	26 App. Div. 176	411
Sanders v. Downs	141 N. Y. 424	397
Sands v. St. John	23 How. Pr. 140	497
Sargeant v. Webster	54 Mass. 497	257
Savings & Loan Soc. v. Thompson.	32 Cal. 347	501
Schaeffer v. Steadman	24 App. Div. 267	360
Schane v. Metropolitan Life Ins. Co.	76 App. Div. 271	480
Schermerhorn v. Cotting	131 N. Y. 48	617
Scoville v. Canfield	14 Johns. 338	17
Scudder v. Mayor	146 N. Y. 248	133
Secor v. Sturgis	16 N. Y. 558	273
Secretary v. McGarrahan	9 Wall. 298	477
Sharp v. Johnson	4 Hill, 92	396
Shattuck v. Bascom	105 N. Y. 39	196
Shaw v. Bryant	65 Hun, 57	474
Sherman v. Parrish	53 N. Y. 483	185
Sherwood v. American Bible Society	1 Keyes, 561	606
Shumway v. Stillman	4 Cow. 202	498
Sickels v. Manhattan Gas-Light Co.	64 How. Pr. 33	288
Siebrecht v. Siegel-Cooper Co.	38 App. Div. 549	56
Silvey v. Lindsay	107 N. Y. 56	391
Sisson v. Hibbard	75 N. Y. 542	314
Sixth Ave. R. R. Co. v. Mayor	17 N. Y. Supp. 904	133
Smiley v. Fry	100 N. Y. 262	311
Smith v. Alker	102 N. Y. 87	564
Smith v. Bailey	14 App. Div. 283	201
Smith v. Bartram	11 Ohio St. 690	502
Smith v. Central Trust Co.	154 N. Y. 333	18
Smith v. Chesebrough	176 N. Y. 317	535
Smith v. Matthews	21 Misc. Rep. 150	548
Smith v. Smith	4 App. Div. 227	474
Smyth v. Smyth	2 Add. 254	325
Snyder v. Sloane	65 App. Div. 543	333
Society for Propagation of Gospel v. Town of Pawlet	4 Pet. 480	611
Solomon v. Philadelphia & N. Y. Ex. Co.	2 Daly, 104	238
Southwick v. First National Bank.	84 N. Y. 420	472
Spicer v. Waters	65 Barb. 227	73
Splittorf v. State of New York	108 N. Y. 205	138
Spooner v. D., L. & W. R. R. Co.	115 N. Y. 22	16
Stanton v. Miller	58 N. Y. 192	438
Starkweather v. Starkweather	29 Hun, 488	330
State v. Elkinton	30 N. J. Law, 335	477
Staten Island Midland R. R. Co. v. Hinchliffe	170 N. Y. 473	208
Stebbins v. Kay	123 N. Y. 31	396
Steck v. Colorado Fuel & Iron Co.	142 N. Y. 236	589
Steinson v. Board of Education	165 N. Y. 431	12
Sternaman v. Metropolitan Life Ins. Co.	170 N. Y. 13	481
Steuben County Bank v. Alberger.	78 N. Y. 252	311
Stieffel v. Tolhurst	32 Misc. Rep. 469; affd., 55 App. Div. 532	301, 580
Stokes v. Weston	142 N. Y. 433	10
Stoneman v. Erie R. Co.	52 N. Y. 429	17
Storrs v. City of Utica	17 N. Y. 109	137

Digitized by Google

		PAGE.
Story v. Elliot	8 Cow. 27	498
Story v. New York El. R. R. Co.	90 N. Y. 122	430
Stringham v. Stewart	8 Civ. Pro. 420	336
Stuart v. Palmer	74 N. Y. 183	368
Studer v. Bleistein	115 N. Y. 316	215
Stull v. Westfall	25 Hun, 1	411
Sudbury v. Stearns	38 Mass. 148	258
Susquehanna Bank v. Supervisors of Broome County	25 N. Y. 312	511
Sutherland v. Lasher	41 Misc. Rep. 249; affd., 87 App. Div. 633	518
Sweet v. City of Syracuse	129 N. Y. 316	367
Sweet v. Morrison	116 N. Y. 19	557
Sweet v. Sprague	55 Me. 190	501
Syracuse City Bank v. Davis	16 Barb. 188	610

T.

Tallman v. White	2 N. Y. 66	396
Taylor v. Coots	32 Nebr. 30	500
Taylor v. Syme	162 N. Y. 519	71
Thomas v. Dakin	22 Wend. 91	611
Thomas v. Dickinson	12 N. Y. 364	460
Tifft v. Horton	53 N. Y. 377	314
Tockerson v. Chapin	52 N. Y. Super. Ct. 16	38
Towle v. American B. L. & L. Soc.	61 Fed. Repr. 448	298
Town of Essex v. New York & C. R. R. Co.	8 Hun, 361	580
Town of North Hempstead v. Town of Hempstead	2 Wend. 109	611
Treadwell & Co. v. Mead Mfg. Co.	75 App. Div. 478	420
Trenton Banking Co. v. Duncan	86 N. Y. 221	482, 521
Trimmer v. City of Rochester	130 N. Y. 405	131
Tripler v. Mayor	125 N. Y. 623	131
Trowbridge v. Didier	4 Duer, 448	219
Truesdell v. Bourke	145 N. Y. 612	472
Trustees of Watertown v. Cowen	5 Paige, 510	422

U.

Underhill v. Keirns	54 App. Div. 214	396
United States v. Ballin	144 U. S. 1	257
United States v. Boutwell	17 Wall. 604	477
United States Ice & Refrigerating Co. v. Reed	2 How. Pr. (N. S.) 253	573
United States Trust Co. v. Brady.	20 Barb. 119	612
Upington v. Keenan	21 N. Y. Supp. 699	548

V.

Vail v. Long Island R. R. Co.	106 N. Y. 283	613
Valentine v. Applebee	87 Hun, 1	333
Van Inwegen v. Port Jervis, M. & N. Y. R. R. Co.	165 N. Y. 625	264
Van Nostrand v. Hubbard	35 App. Div. 201	627
Van Zandt v. Van Zandt	23 Abb. N. C. 328	172
Vischer v. Vischer	12 Barb. 640	17
Vogel v. Banks	60 App. Div. 459	82
Vought v. Eastern Building & Loan Assn.	172 N. Y. 508	50

Digitized by Google

W.

		PAGE.
Wachtel v. Noah W. & O. Soc.	84 N. Y. 28	144
Wakeman v. Wilbur	147 N. Y. 663	429
Wallace v. Mayor	53 App. Div. 187; affd., 165 N. Y. 658	133
Wallace v. Syracuse, B. & N. Y. R. R. Co.	27 App. Div. 459	172
Walsh v. Trustees of New York & Brooklyn Bridge	96 N. Y. 427	611
Waltham Mfg. Co. v. Brady	67 App. Div. 102	301
Ward v. Littlejohn	17 Civ. Pro. 178	425
Ward v. N. Y. C. R. R. Co.	47 N. Y. 32	238
Ward v. Petrie	157 N. Y. 301	16
Watson v. Jones	13 Wall. 679	144
Weaver v. Barden	49 N. Y. 286	161
Weiss v. Herlihy	23 App. Div. 608	5
Welch v. Importers' & T. N. Bank.	122 N. Y. 177	573
Wells v. Kelly	11 Utah, 421	501
Western Union Tel. Co. v. Syracuse El. L. & P. Co.	178 N. Y. 325	538
Weston v. Ives	97 N. Y. 222	145
Wetmore v. Parker	52 N. Y. 459	613
Weyburn v. White	22 Barb. 82	244
White v. Brownell	4 Abb. Pr. (N. S.) 162	145
White v. Koster	89 Hun, 483	301
White v. Ross	15 Abb. Pr. 66	610
Whitford v. Panama R. R. Co.	23 N. Y. 465	17
Whitney Arms Co. v. Barlow	63 N. Y. 62	50
Wilcox Silver Plate Co. v. Barclay	48 Hun, 54	548
Wilkinson v. Raymond	80 App. Div. 378	525
Williams v. Webb	27 Misc. Rep. 508	231
Wilmerding v. McKesson	103 N. Y. 329	184
Wilson v. Underhill	83 Hun, 233	333
Windecker v. Mutual Life Ins. Co.	12 App. Div. 73	317
Wing v. De La Rionda	131 N. Y. 422	27
Wood v. Morehouse	45 N. Y. 369	501
Wood v. Zornstorff	59 App. Div. 538	107
Wooden v. W. N. Y. & P. R. R. Co.	126 N. Y. 10	17
Woodruff v. Paddock	130 N. Y. 625	430
Worthington v. London G. & A. Co.	164 N. Y. 84	86

Y.

Yates v. Yates	9 Barb. 324	613
Young v. Young	80 N. Y. 422	106

Z.

Zacharias v. French	10 Misc. Rep. 202	301
Zeigler v. Galvin	45 Hun, 44	333
Zimmer v. Metropolitan St. R. Co.	32 Misc. Rep. 262	269
Zimmer v. Wheeler	2 N. Y. St. Repr. 325	488
Zink v. McManus	121 N. Y. 265	396

UNITED STATES CONSTITUTION CITED.

	PAGE.
United States Constitution, art. IV, § 1	18

Digitized by Google

UNITED STATES REVISED STATUTES CITED.

PAGE.
U. S. Rev. Stats., tit. 13, chap. 17, § 905 18

NEW YORK STATE CONSTITUTION CITED.

PAGE.
State Constitution of 1846, art. VI, § 14 83
State Constitution of 1846, art. VI, § 15 86
State Constitution of 1846, art. VIII, § 1 612
State Constitution, art. I, § 1 ..... 125, 148
State Constitution, art. I, § 3 148
State Constitution, art. II, § 3 390
State Constitution, art. III, § 16 363
State Constitution, art. V, § 9. 528
State Constitution, art. VI, § 5 170
State Constitution, art. VI, § 14 (1894) 87
State Constitution, art. VI, § 17 357
State Constitution, art. VI, § 18 358
State Constitution, art. VIII, § 1 612
State Constitution, art. VIII, § 10 ..... 366, 528
State Constitution, art. XIII, § 1 194

NEW YORK STATE STATUTES CITED.

PAGE.
1 R. S. 662, §§ 8, 9..... 243
1 R. S. 726, § 40 80
2 R. S., page 225, art. I, 1829. 86
2 R. S., m. p. 469, § 67..... 37
2 R. S. 962, § 8 90

BIRDSEYE'S EDITION CITED.

PAGE.
Birdseye, R. S. (2d ed.) 683, 693 37
Birdseye, R. S. (2d ed.) 685. 36
Birdseye's Stat. (3d ed.) 299.. 243
Birdseye (3d ed.), 758, § 115. 37
Birdseye, R. S. (3d ed.) 760, § 127 36

SESSION LAWS CITED.

PAGE.
Laws of 1841, chap. 225..... 434
1847, chap. 280..... 83
1848, chap. 319..... 606
1857, chap. 383..... 434
Laws of 1857, chap. 639..... 436
1864, chap. 555..... 11
1867, chap. 334..... 513
1877, chap. 466..... 170

Digitized by Google

	PAGE.
Laws of 1880, chap. 480	84
1882, chap. 410	133, 151, 246, 511
1884, chap. 149	359
1885, chap. 261	364
1885, chap. 380	170
1886, chap. 21	552
1886, chap. 547	371
1888, chap. 40	357
1889, chap. 125	357
1890, chap. 568	435
1890, chap. 569	392
1892, chap. 418	420
1892, chap. 680	478
1892, chap. 681	248
1892, chap. 685	265
1893, chap. 380	85
1893, chap. 537	522
1893, chap. 576	361
1893, chap. 661	352
1894, chap. 134	170
1894, chap. 451	11
1894, chap. 567	522
1895, chap. 570	242
1896, chap. 112	348
1896, chap. 546	123
1896, chap. 910	132
1897, chap. 378	86, 273
1897, chap. 766	513
1898, chap. 79	513
1898, chap. 165	335
1898, chap. 182	131, 248, 254
1898, chap. 331	11
1899, chap. 76	76
1899, chap. 225	335
1899, chap. 370	529
1900, chap. 370	361
1900, chap. 729	522
1902, chap. 30	13
1902, chap. 97	174
1902, chap. 127	364
1902, chap. 270	529
1902, chap. 315	362
1902, chap. 321	435
1902, chap. 580	227, 246
1903, chap. 137	551
1903, chap. 389	361
1903, chap. 522	397
1904, chap. 169	123
1904, chap. 624	510
1904, chap. 629	361

CODE OF CIVIL PROCEDURE CITED.

	PAGE.
Code Civ. Pro., § 46	452
§ 52	266
§ 73	335
§ 340	83
§ 447	276
§ 498	16
§ 499	16
§ 501	56
§ 507	208
§ 522	497
§ 531	165
§ 533	219
§ 545	579
§ 572	29
§ 603	168, 411
§ 650	419
§ 709	420
§ 791	45, 316
§ 968	316
§ 983	242
§ 1013	583
§ 1187	463, 479
§ 1268	517
§ 1311	227
§ 1391	408
§ 1525	27
§ 1670	25
§ 1674	25
§ 1709	561
§ 1784	35
§ 1785	38
§ 1787	37
§ 1788	37
§ 1793	35
§ 1843	129
§ 1909	17
§ 1919	490
§ 2471a	248
§ 2552	339
§ 2555	339
§ 2642	70
§ 2643	70
§ 2695	70
§ 2697	70
§ 2714	338
§ 2727	442
§ 2731	624
§ 2732	442
§ 2750	128
§ 2934	85
§ 2942	246
§ 2960	455
§ 3068	85
§ 3075	454

Digitized by Google

		PAGE.			PAGE.
Code Civ. Pro.,	§ 3162	217	Code Civ. Pro.,	§ 3367	275
	§ 3343	452		§ 3369	275
	§ 3357	276		§ 3372	277
	§ 3365	275		§ 3384	276

CODE OF CRIMINAL PROCEDURE CITED.

		PAGE.			PAGE.
Code Crim. Pro.,	§ 145	635	Code Crim. Pro.,	§ 264	350
	§ 148	635		§ 268	350
	§ 149	635		§ 272	350
	§ 150	635		§ 275	89
	§ 204	637		§ 276	89
	§ 208	640		§ 293	97
	§ 220	640		§ 312	350
	§ 221	636		§ 313	350
	§ 256	348		§ 323	350
	§ 262	350		§ 773	21
	§ 263	350		§ 887	124

PENAL CODE CITED.

		PAGE.			PAGE.
Penal Code,	§ 168	90	Penal Code,	§ 290	634
	§ 171	91		§ 344a	550
	§ 259	119		§ 687a	551
	§ 262	119		§ 697	551
	§ 265	114, 119			

GENERAL RULES OF PRACTICE CITED.

	PAGE.
General Rules of Practice, rule 37	311
General Rules of Practice, rule 64	426

Digitized by Google

THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING JUNE, 1904.

PETER HALE, Plaintiff, *v.* JOSEPH BURNS, Defendant.

(Supreme Court, Kings Special Term, June, 1904.)

Injunction — Police captain permanently restrained from keeping his officers in a licensed saloon, and in a dining room above it conducted by the saloon proprietor in connection with it, upon his mere suspicion that gambling is being carried on upon the dining room floor.

A police captain who keeps his officers stationed in a licensed saloon and in a dining room on the floor above conducted by the saloon proprietor in connection with the saloon, upon his mere suspicion or claim that gambling is being carried on in a room on that floor, rented of the saloon proprietor by an incorporated social club, which officers interfere with people coming in, sometimes forbid or prevent them from going up to the dining room floor, prevent butchers, who have leased a dressing room on that floor from entering it — all to the great damage of the proprietor — is guilty of trespass and, at the suit of the proprietor of the saloon, the police captain will be permanently restrained from the further commission of such trespasses on the premises.

SUIT for an injunction to restrain the defendant, who is a captain of police, from a continual trespass on the plaintiff's premises. Motion for a permanent injunction.

Louis H. Reynolds for plaintiff.

John F. O'Brien for defendant.

Digitized by Google

GAYNOR, J.: The facts disclosed in this case by the complaint and affidavits are undisputed in all essentials, and it is only necessary to state them to show the outrageous criminal lawlessness being practiced against the plaintiff by this captain of police. The plaintiff has a saloon and restaurant at 193 Washington street, opposite Washington market, in the borough of Manhattan. He is licensed by the State. His saloon is on the ground floor and his eating room on the second floor. Adjoining the eating room is a toilet room for women patrons. Another room on the second floor is leased of him by butchers who have stalls in Washington market. They use it as a clothes room and dressing room, needing such a place near their business. Since February 1, 1904, the defendant has kept police officers, most of the time two, in the plaintiff's place every day from midday until it is closed at night. They stand about, loiter at the women's toilet room, sit in the dining room, interfere with people who come in, sometimes forbid them to go up to the dining room floor, and sometimes prevent them, and also forbid and prevent the butchers from entering their clothes room. The result is that the butchers have given up their room, and the plaintiff's business has greatly fallen off. He has repeatedly requested the officers to leave his place, but they have always refused, saying that they were there by order of their captain to watch that no gambling took place there. The plaintiff also went with his counsel to the defendant at the station house and demanded that he withdraw the policemen from the plaintiff's place, but he refused, and said he would keep them there until he drove the plaintiff out of his precinct. The excuse given by the defendant in his affidavit for his high-handed and lawless conduct is that he suspects that cards are played for money in a room on the same floor where the plaintiff's dining room is. The room is occupied by an incorporated social club named the Sunnyside Club. He says Matthew Strip is connected with the club, and also frequents the plaintiff's place. The plaintiff has nothing to do with this room, or with the club. The defendant has no evidence of any gaming in the room of the club, or in the plaintiff's rooms, and has not arrested anybody in or about the place.

Digitized by Google

or made a complaint before a magistrate against any such person. He is acting without any warrant or authority whatever, and is evidently under the dangerous delusion that he is an official of unlimited powers, and free to exercise force and violence over any person or place in his precinct. He thinks he has the right to rule with a shillalah or policeman's club. He is either grossly ignorant, or else a wilful and dangerous criminal. His acts clearly constitute the crime of oppression, and it is fortunate that they have not provoked violence, and even bloodshed, for the plaintiff has the right to resist them with all the force necessary. When the plaintiff and his counsel saw him he also declared he would drive Matthew Strip and his brother out of his precinct, and would keep his officers in the plaintiff's place so long as he allowed the Strips to come in there. We read of such official conduct in Russia, and profess to be astonished over it, but we have had more of it in the city of New York for the last twenty-five years, and especially during the last eight or nine years, than there has been in any other place in the civilized world. Matthew Strip, whom this police captain assumes to drive out of his precinct, makes affidavit that he is thirty years of age, is married, has lived all of his life in the borough of Manhattan, and in January, 1898, was appointed to the highly exacting and responsible position of chief index clerk in the county clerk's office in New York county, and has ever since held a clerkship in that office, and that he has nothing to do with gambling in the plaintiff's place or in any place. He swears the defendant has a standing grudge against him growing out of past local political contests.

The affidavits of the defendant and his policemen abound in statements of common rumor and suspicion concerning persons who go to the plaintiff's place, and also name some of them as having been arrested by the police in years gone by, but never convicted. The defendant evidently supposes that an arrest by a policeman in the city of New York is proof that the person arrested is a criminal; but this is not true anywhere, much less in the city of New York, where thousands of grossly illegal and oppressive arrests and trespasses have been made yearly at the instigation of police officials.

Digitized by Google

especially in recent years. The defendant denies that he told the plaintiff that he would drive him out of the precinct, but the evidence that he did so is safely true. He says, however (and it is quite as lawless), that he did state that he would not withdraw his officers from the plaintiff's place "until the Strips had stopped running a gambling place" there; and this without having any evidence whatever that there was ever any gambling there.

This case was argued before me two months ago, but I have refrained from deciding it so that those in authority over this police captain might call him to account for his lawless conduct, and make a decision here unnecessary, for it is irksome to have to repeatedly decide that the police have no right to invade any one's house or place of business without a warrant from a magistrate, except in pursuit of a fleeing criminal, or on a call for help against violence, and the like. The safeguards against such invasions, and against unlawful arrests, which are found in our constitutions in this country, are the warp and the woof of our system of government, and of free government everywhere. They mark the distinction between free government and despotism. When they are set at naught, free government is gone, and government by force, or despotism, takes its place. If the police are suffered to invade and raid houses and business places without warrants, they will inevitably use that as a means of extorting money. Experience shows this to be a thing not open to doubt. Indeed, it is sufficiently known among us that that is the method by which millions of dollars have been extorted annually in the city of New York, and police officials have been enabled to retire, one after another, with great wealth. Such police lawlessness is far more dangerous than all the gambling and other vices combined. It brings in its train all of the vices, and debases government and society. The voters of this city have four times in succession voted out official control of the city which permitted and sometimes encouraged such police lawlessness, and they will do it again. They have by no means lost their sense of the blessings of free government. All that most men have is their liberty, and their right to vote, and while they have the latter they do not propose to lose the

Digitized by Google

former. The notion that the police, or police officials, however high, may violate the law in their efforts or pretenses to make others obey it, is a most pernicious one. What they cannot do by keeping within the law themselves, the law does not require or suffer them to do at all. It is not for them to try to be, or pretend to be, stricter or better than the law, or to resort to means which the law regards as destructive of free government, and does not permit. The law can be effectually and permanently enforced only in a lawful, orderly and uniform manner. This is a case in which it is the bounden duty of the judiciary to speak out plainly, after the manner of judges in England and here from the earliest times. In a free government, the courts are the guardians of the rights and liberties of the people.

The learned counsel for the defendant concedes that the acts complained of are an unlawful trespass, and admits that the limitations of the powers of the police are correctly laid down by this court and the Court of Appeals in the *Glennon* case (37 Misc. Rep. 1; 175 N. Y. 45), and in the *Summers* case (40 Misc. Rep. 384). Invoking, however, the rule of equity that a plaintiff in order to get relief must come into court with clean hands, he claims that this plaintiff's hands are not clean, for which he cites the case of *Weiss* v. *Herlihy* (23 App. Div. 608). The decision there is by a seriously divided court, and is, at best, it seems to me, unauthoritative except in a case exactly the same. So far as this case is concerned, the plaintiff's hands are clean; and, indeed, nothing is proved against him outside of it. But if he were a man of bad or inferior character, he would be entitled to the protection of the laws and the courts in his rights. The police cannot trample on people on any such ground as that. It is not for them to adjudge any man to be good or bad, but for the courts. If they claim that this plaintiff is a criminal, let them bring him into court on a warrant and prosecute him.

The motion is granted.

Digitized by Google

THE PEOPLE'S TRUST CO., as Trustee under the Will of JOHN FLYNN, Deceased, Plaintiff, *v.* MARY C. FLYNN et al., Defendants.

(Supreme Court, Kings Special Term, June, 1904.)

Testamentary trust in a residuary estate — A provision, excluding a grandson, defeated by the testator's limiting the succession of each of his children to issue and failing to direct disposition of the share of a child who died after him, without issue and pending the trust — Devisable remainder — The word "previously", in the phrase, "if they (the sons) shall have previously died leaving issue" held not to be limited to a death occurring in the lifetime of the testator — When the corpus does not vest in remainder.

A testator left a widow, two daughters, three sons and a grandson, gave his entire residuary estate to his executors, in trust, to collect the rents, etc., pay out of the net income an annuity to his widow in lieu of dower and divide and pay the residue of income equally to and among the children, or the issue of a child dying, until the death of the two daughters — who are still living. He directed that, if any of the children should die before him, without issue surviving them, the net income should be divided among those living or represented. Upon the death of the two daughters, he devised the entire estate to the issue of the two daughters, to the issue of the three sons, "or to the issue of either of said sons, if they shall have previously died leaving issue, such issue taking the share which would have belonged to its parent in equal share; hereby excluding my grandchild * * * or his issue from any participation in the division of my residuary estate". A son died, pending the trust, intestate, unmarried and without issue.

Held, that the will contained no provision as to the disposition of a share, or of the income of a share, of a child who died, pending the trust, without issue and after the death of the testator, that he died intestate as to such share and its income, and that the grandson, although excluded by the will, was entitled to his proportion of such share, and of its income, as in intestacy.

That, if the will gave each of the three sons a vested remainder in one-fifth of the *corpus* of the trust, the remainder was subject to be divested, as to a son, by his death without issue before the end of the trust and the division of the estate, for the words "or to the issue of either of said sons, if they shall have previously died leaving issue" plainly refer to a death at any time previous to such division.

That the *corpus* did not vest in remainder during the trust, the whole estate being vested in the trustees.

Digitized by Google

SUIT for the settlement of the accounts of the plaintiff as trustee under the will of John Flynn, deceased, and for a construction of the will.

The testator died in 1897, leaving a widow, Annie D. Flynn; two daughters, viz., Mary C. and Regina; three sons, viz., William J., James and John, jr.; and one grandchild, Charles Egan, son of a deceased child.

All of these are still living except the son James, who has died unmarried, without issue, and intestate.

After giving certain legacies, the will provides as follows:

"I hereby give, devise and bequeath all the rest, residue and remainder of my estate real and personal of which I may die seized, entitled to, or possessed of unto my said executors hereinafter named as trustees, to them and their successors to have and to hold the same for the following uses, intents and purposes, viz.:

"To enter into and take possession of same to keep the real estate in repair; to pay all insurance, taxes, assessments and water rents which may accrue against said property and also other necessary expenses, to collect and receive all the rents, issues, profits and income therefrom and out of the net annual income of my said residuary estate to pay over to my wife Annie the sum of one thousand eight hundred dollars ($1,800) per annum, payable half yearly for and during the term of her natural life, which payment shall be in lieu of all dower right or interest which she might or may have in my estate; and also after the payment of the above annuity or dower interest to my wife, to divide the net residue of the income derived under said trust into five equal parts and pay over one share thereof to each of my five children, namely, Mary C., Regina, William J., John, jr., and James, or the issue of each child or any of them who shall die leaving issue, until the death of my two daughters Mary and Regina. If, however, any of said five children shall have predeceased me, without issue surviving them, then said net residuary income shall be equally subdivided among those living or represented.

"Upon the death of my two daughters Mary and Regina I give, devise and bequeath the entire estate of which I may

Digitized by Google

die seized, entitled to or possessed of to the issue of said Mary, the said Regina, William J. Flynn, John Flynn, jr., and James Flynn, or to the issue of either of said sons, if they shall have previously died leaving issue, such issue taking the share which would have belonged to its parent in equal share; hereby excluding my grandchild Charles Egan, or his issue, from any participation in the division of my residuary estate."

The plaintiff has been appointed trustee instead of the trustees appointed by the will.

T. Ellett Hodgskin for plaintiff.

David McClure for the grandson.

John Delahunty for two daughters and son William.

Robert P. Orr for the son John.

M. F. McGoldrick for the widow.

GAYNOR, J.: The son James having died since the death of the testator, the question is what becomes of his share of the income and of the *corpus*. The will leaves the entire residuary estate to the executors in trust during the lives of the two daughters. The trust is to collect the income, and pay the net thereof as follows, viz.: To the wife $1,800 a year in lieu of dower, and the rest share and share alike to the said two daughters and three sons, or those of them who survive the testator, and the issue of any who do not so survive; and also the share of any of them who may die afterwards before the expiration of the trust, to his or her issue.

There is no provision as to what is to be done with the income of one who dies without issue after the death of the testator and during the trust.

A like question arises in respect of the *corpus*. The will is (following the trust provision) that "Upon the death of my two daughters Mary and Regina, I give, devise and bequeath the entire estate of which I may die seized, entitled

Digitized by Google

to or possessed," to the issue, respectively, of the said two daughters; and to the said three sons, or the issue of any of them who shall have previously died leaving issue; "hereby excluding my grandchild Charles Egan, or his issue, from any participation in the division of my residuary estate."

Here there is no provision as to what is to become of the share of a daughter or son who dies without issue whether after or before the testator.

The claim of the plaintiff and of the grandson Charles Egan (who was left nothing) is that as to such a case the testator died intestate in respect both of the income and the *corpus;* that of the surviving sons and daughters is that by the will the share both of income and of *corpus* of the deceased son goes to them and their issue, the share of the *corpus* to remain in the trust and be divided as part and parcel of the residuary at the end of the trust.

The intention of the testator that there should be no case of intestacy in the distribution of the *corpus* was beyond doubt. He gives and bequeaths his "entire estate;" and also takes care to express his purpose to exclude his grandchild from the division at the end of the trust, which he would necessarily participate in in case of any intestacy.

But the trouble is that there are no words of bequest or devise, either express or by implication or construction, on which to now base and carry out such intention. That the testator thought he was avoiding any intestacy is not enough; his words must be given their just meaning and limit, and beyond that he has not spoken. The line of any child failing, there is no bequest or devise of his or her share collaterally. The testator based the final division on each son being then alive or represented by issue, so as to exclude the grandson from participating, and this has failed. And if remainders were vested in the sons by the will, the grandson would not be excluded from the division in the case of a son dying without issue, for he would be one of the heirs of such son. There is therefore no reason for resorting to a forced construction to vest remainders in the sons.

But if there be by the will a vested remainder of one-fifth of the *corpus* in each of the three sons, it was subject to be

Digitized by Google

divested on his death without issue before the end of the trust and the division of the estate; for the words "or to the issue of either of said sons, if they shall have previously died leaving issue", plainly refer to a death at any time previous to such division. To refer the word "previously" to a death occurring in the life time of the testator, only, after the general rule, would seem to do violence to the plain meaning of the context, which rises above all artificial rules (Mead v. Maben, 131 N. Y. 255; Stokes v. Weston, 142 N. Y. 433; Benson v. Corbin, 145 N. Y. 351). I speak with reserve, for the decisions of our highest court on this head from *Moore* v. *Lyons* (25 Wend. 119) to *Matter of Tompkins* (154 N. Y. 634), *Connelly* v. *O'Brien* (166 N. Y. 406) and *Dougherty* v. *Thompson* (167 N. Y. p. 483), vary. Such general rule has been applied to cases that seem as clear to the contrary as the present case, and rejected in cases not so clear, with the idea, it would seem, of doing justice in each case.

But the *corpus* does not seem to vest in remainder at all during the trust. On the contrary, the whole estate is vested in the trustees (Delafield v. Shipman, 103 N. Y. 463; Howland v. Clendenin, 134 N. Y. 305). The case of *Matter of Tompkins* to the contrary seems an extreme one.

The will having limited the succession in respect of each of the five children to issue, there is intestacy in the case of the deceased son James for lack of issue, in respect of both the trust income and the *corpus*.

Judgment accordingly.

FRANK M. BOGERT, Plaintiff, *v.* THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Trial Term, June, 1904.)

New York city — Tenure of teachers in Brooklyn.

A person, duly employed as a teacher in the city of Brooklyn when, on Jan. 1, 1898, it became a part of the new city of New York, was continued by its charter (L. 1897, ch. 378, §§ 1114, 1117) in the same position and grade, not merely until the end

Digitized by Google

of the term of that employment but until removed for cause after trial by his school board, and, therefore, where, after the expiration of that term of employment and after Jan. 1, 1898, the city superintendent of schools refused to permit the person to continue as a regular teacher, he is entitled to recover of the city board of education his salary as fixed less anything he has earned in the meantime as a substitute.

MOTION by both sides to direct a verdict, reserved for consideration.

Action to recover salary as a school teacher in the city of New York at the rate of $1,250 a year, payable in equal monthly payments, from July 1, 1898, to December 1, 1901. The facts are as follows:

The plaintiff held a certificate of qualification to teach from the State Superintendent of Public Instruction, under section 15 of title 1, chapter 555 of the Laws of 1864 as amended by chapter 331 of the Laws of 1898, and was employed as principal of a common school in the town of New Utrecht when that town became a part of the city of Brooklyn on July 1, 1894, by virtue of chapter 451 of the Laws of 1894. By section 13 of that act the plaintiff's eligibility, status and grade as a teacher were continued under the city administration. He continued to teach in the city of Brooklyn and was principal of one of its branch schools when that city became a part of the new city of New York on January 1, 1898. He was employed for a fixed term which was to expire on June 30, 1898. At the expiration of that term the city superintendent of schools refused and has continued to refuse to permit him to continue as a regular teacher, but gave him a certificate to teach as a substitute as he might be able to get opportunity in the case of sick or absent teachers. The plaintiff offered to continue to teach in his grade, and has continued ready to do so.

Lavina Lally and Ira Leo Bamberger for plaintiff.

Jerome W. Coombs for defendant.

GAYNOR, J.: The plaintiff being employed as a teacher in the city of Brooklyn at the time it became part of the new city of New York, he was continued in the same position

Digitized by Google

or grade by the charter of the new city, not merely for the remainder of the term for which he was then employed, viz., until July 1, 1898, but like all other teachers in the new city, for an indefinite term of employment, i. e., until removed for cause after a trial by his school board (§§ 1117, 1114; People ex rel. Callahan v. Board of Education, 174 N. Y. 169). The city superintendent of schools had no power to remove him or prevent him from teaching in his grade, and he is entitled to recover for the breach of his contract of employment (Steinson v. Board of Education, 165 N. Y. 431). The measure of damages is his salary less anything he has earned meanwhile as a substitute.

I direct a verdict for the plaintiff for $4,270.83, with interest.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* BURDETT BISHOPP, Defendant.

(Supreme Court, Madison Special Term, June, 1904.)

Agricultural Law — Constitutionality and construction of L. 1902, ch. 30, relative to tagging shipped carcasses of calves.

Section 70f, added to the Agricultural Law with section 70e by L. 1902, ch. 30, making it unlawful "to ship to or from any part of this state" any carcass of a calf unless there is attached thereto a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping and the destination and the age of the calf, was intended by the Legislature to apply to every shipment of carcasses of calves to or from any part of this State, no matter whether the calf, when slaughtered, was within the age of four weeks, prescribed by section 70e, or whether the shipment was to some point in another State.

The statute is not violative of the interstate commerce provisions of the Federal Constitution nor does it conflict with the Constitution of the State of New York as an unreasonable interference with private rights and property.

DEMURRER to complaint.

Alphonso E. Fitch, for plaintiff.

Charles J. Coleman (Joseph Mason, of counsel), for defendant.

Digitized by Google

MILLER, J. The question here presented arises upon the defendant's demurrer to the second cause of action of the plaintiff's complaint, which alleges a violation of section 70f, article 4, of the Agricultural Law, being a portion of chapter 30 of the Laws of 1902, and the defendant contends that the statute does not apply to shipments from this State to other States, which is the act alleged in the complaint, and, second, that if it does, it is in violation of the interstate commerce provision of the Federal Constitution, and, third, that it is in conflict with the State Constitution, as being an unreasonable interference with private rights and property.

It will be noticed that the statute makes it unlawful to ship "*to or from any part of this state*" any carcass or carcasses of a calf or calves, unless a tag is attached in the manner required. The plain meaning of the section, standing alone, clearly extends to every shipment to or from a point in the State, and, therefore, includes the case alleged in the complaint, unless it can be seen by reference to other parts of the statute that it was only intended to refer to a particular class of shipments. Section 70f was undoubtedly intended as a means to secure the enforcement of section 70e, which precedes it, and which prohibits the slaughtering, exposing for sale or selling, within the State, for food, any calf, unless it is in good, healthy condition, and at least four weeks old at the time of killing. Section 70f does not apply simply to animals, the sale of which, within the State, is prohibited, but applies to all of the class, the selling of which below a certain age is prohibited. This section does not make it unlawful to ship these carcasses, does not in any manner prohibit their shipment, but simply imposes a condition, to wit: the tagging in the manner required. If the section should be so limited as to apply only to the animals, the sale of which is prohibited, it would assist but little in the detection of violations of section 70e. I think, therefore, that reading the section according to the plain meaning of the words used, and giving it the intention which reference to other parts of the statute clearly show it to have, it must be held that section 70f is intended to apply to every shipment of carcasses of calves, to or from any part of this State, no

Digitized by Google

matter whether the calf when slaughtered was within the age prescribed by section 70e or whether the shipment was to some point in another State.

As to the objection that it is in violation of the Federal Constitution, the statute does not import by its term to regulate in any manner interstate commerce, and such is not its effect. It is not the case of a prohibition against some article of commerce, neither is it a case of the imposition of some unreasonable regulation, the practical effect of which results in such prohibition. It not only does not prohibit the shipment of any carcass; it in no manner restricts such shipment. It simply and solely requires that a tag, containing the information required, be affixed to the carcass. This seems to be a very easy and practicable thing to do, unless the shipper is attempting to violate section 70e, under the pretense that he is shipping such carcass out of the State, and that it is not intended for use as food within the State. The object of this statute is undoubtedly to protect the health of the citizens of the State, and for that purpose it prohibits the sale of so called "bob veals" as food, on the theory that they are unhealthful. Such appears to be plain from a reading of the statute with reference to its context. It may be regarded as a matter of common knowledge that very young calves are unwholesome and unfit for food. It is clearly within the province of the Legislature, therefore, in the exercise of the police power, to prohibit the sale of such calves for food. The act in question must be regarded as expressing the judgment of the Legislature that four weeks is the minimum age under which calves are unwholesome and unsuitable as food, and, giving this law the presumption to which it is entitled, this conclusion cannot be said to be unreasonable or contrary to the common knowledge of mankind. Section 70f may, therefore, be regarded as a reasonable, and, in fact, a necessary requirement to compel obedience to section 70e, and it cannot be regarded as in any manner a regulation of or interference with interstate commerce, but as a reasonable exercise of the police power of the State to secure obedience to a reasonable law to protect the people of the State against the sale of unwholesome food.

Digitized by Google

This cannot be regarded as in any way interfering with the property rights of the defendant. The statute simply requires him to put a tag on all carcasses shipped by him which will give the officers of the State such information as will enable them to verify the statement as to their age, and to trace them to their destination so as to insure that they shall not be sold in this State for food if within the prohibited age. To assert that putting a tag on the carcass, showing the age of the calf when slaughtered, injures the property rights of the defendant is an admission that the calf is of such an age as that, if the truth be told, it will take away the value which it could only possess by being fraudulently sold as an article which it is not. If the defendant was not attempting to violate the law, he could not be injured in any way by being compelled to give the information required. If this information enables the officers of the State to prevent him from violating section 70e, he has been deprived of no right; he has simply lost an opportunity to violate the law. I have been unable to find any authority holding that among the rights protected by the Constitution is the right to deceive or defraud the public.

The demurrer must be overruled and judgment directed for the plaintiff, with costs, with leave to the defendant to plead over upon payment of costs.

Demurrer overruled and judgment directed for plaintiff, with costs, with leave to defendant to plead over upon payment of costs.

MARTIN J. WATERS, Plaintiff, *v.* RALPH L. SPENCER, Defendant.

(Supreme Court, New York Trial Term, June, 1904.)

Action on a foreign judgment brought by an assignee — Objection that the plaintiff has not legal capacity to sue when waived — Assignee's right to sue in his own name — Presumption as to foreign law — The lexi fori governs the remedy and procedure — Validity of a foreign judgment, lacking the judge's signature — Effect of an exemplified copy.

The objection that a plaintiff has not legal capacity to sue can be raised only by answer or demurrer upon such ground and if not so raised is waived.

Digitized by Google

Where the validity of an assignment of an Illinois judgment is not questioned, in an action brought thereon in the State of New York by the assignee thereof, he is the real party in interest and expressly authorized by Code Civ. Pro., § 1909, to bring the action in his own name.

The presumption, in the absence of proof to the contrary, that the law of a foreign State is like our own does not extend to positive statutory law.

The *lex fori* governs in all matters relative to the remedy and the course of procedure.

A duly exemplified copy of a judgment, rendered in an Illinois court of general jurisdiction, although not signed at its end by the judge who presided at the trial, is, where no fraud or mistake is shown, entitled under the Constitution of the United States, art. IV, § 1, to the same credit here to which it would be entitled in Illinois, and where its courts have decided that the judge's signature is not necessary in that State to a judgment's validity, the exemplified copy is competent evidence, for the assignee, of the existence of the judgment.

MOTIONS to dismiss the complaint and for a new trial.

Stephen Callaghan, for plaintiff.

William K. Hall, for defendant.

CLARKE, J. The defendant moves to dismiss the complaint on the ground that plaintiff has neither stated nor proved a cause of action. The first question raised is whether or not an assignee of a judgment recovered in Illinois can maintain an action in his own name thereon in this State. The legal capacity to bring an action and the existence of a cause of action are distinct. A motion to dismiss is equivalent to a summary demurrer upon the ground that the complaint does not state facts sufficient to constitute a cause of action. Albany Belting & Supply Co. v. Grell, 67 App. Div. 81, 85. The objection that the plaintiff has not legal capacity to sue can be raised only by answer or demurrer upon such ground, and if not so raised, it is waived. Code Civ. Pro., §§ 498, 499; Nanz v. Oakley, 122 N. Y. 631; Ward v. Petrie, 157 id. 301; Spooner v. D., L. & W. R. R. Co., 115 id. 22. It is, however, clear that plaintiff has a good cause of action and legal capacity to sue. No evidence of the statutory law of

Digitized by Google

Illinois was introduced. In such case the common law, as interpreted by our courts, will be presumed to be in force in the sister State. The validity of the assignment of this judgment is not questioned. At common law the assignment passed the equitable title, vesting in the assignee the exclusive right to control the judgment, to sue thereon in the name of the assignor and to receive the proceeds when collected. The presence of the assignor on the record, as holding the legal title, is merely a formal requirement. Black Judg. (2d ed.) 940; Freem. Judg. (4th ed.), § 421. The assignee is the real party in interest, and in this State, by the provisions of section 1909 of the Code of Civil Procedure, he is expressly authorized to bring action in his own name. It is urged by the defendant that the assignee is not vested with the right to sue in his own name by this statute, because it cannot be presumed that such right is conferred by like statute in Illinois. The presumption, in the absence of proof to the contrary, that the law of a foreign State is like our own does not extend to positive statutory law. First Nat. Bank v. National B'way Bank, 156 N. Y. 472; Wooden v. W. N. Y. & P. R. R. Co., 126 id. 10; Leonard v. Columbia St. Nav. Co., 84 id. 48; McDonald v. Mallory, 77 id. 546; Whitford v. Panama R. R. Co., 23 id. 465, 468. But the law of Illinois, whatever it be, is not controlling on the question of the plaintiff's right to bring the action in his own name. "The *lex fori* governs in all matters relating to the remedy and the course of procedure." 22 Am. & Eng. Encyc. of Law (2d ed.), 1383. Thus it governs as to the parties to the suit. Stoneman v. Erie R. Co., 52 N. Y. 429; Merchants' Loan & Trust Co. v. Clair, 36 Hun, 362; Johnson v. Huber, 134 Ill. 511. In Pritchard v. Norton, 106 U. S. 124, Mr. Justice Mathews, in discussing the scope of the application of the *lex fori*, says (at p. 130): "Whether an assignee of a chose in action shall sue in his own name or that of his assignor is a technical question of mere process, and is determinable by the law of the forum." Lodge v. Phelps, 1 Johns. Cas. 139; Scoville v. Canfield, 14 Johns. 338; Andrews v. Herriot, 4 Cow. 508, 510; Vischer v. Vischer, 12 Barb. 640, 645; Barth v. Iroquois Furnace Co., 63 Ill.

Digitized by Google

App. 323; Leach v. Greene, 116 Mass. 534. In the case before me the action is properly brought in the name of the assignee, as the law of this forum prescribes.

The further question is whether the exemplified copy of the Illinois proceeding is competent evidence of a judgment, it appearing that there is no signature of the judge at the end of the judgment. The Constitution of the United States provides that full faith and credit shall be given in each State to the judicial proceedings of every other State, and empowers Congress to prescribe the method of proving such proceedings and their effect. U. S. Const., art. IV, § 1. The United States Revised Statutes (title 13, chap. 17, § 905) prescribe the method of authentication. When the judgment of a court of general jurisdiction is properly authenticated as prescribed, it will not be questioned unless fraud be shown or there be a jurisdictional defect. Smith v. Central Trust Co., 154 N. Y. 333. The question of jurisdiction is not before this court. Want of jurisdiction is an affirmative defense and must be pleaded. Rice v. Coutant, 38 App. Div. 543. Mr. Justice Woodward, in that case (at p. 548), says: "The general denial is a denial only of the fact of the existence of the judgment, and the plaintiff, in producing a duly attested copy of the judgment, has met all the requirements of the case, and is entitled to judgment under the pleadings." The copy of the proceedings offered in evidence was duly attested. It is, however, contended that no judgment in fact is proven thereby, that the record is imperfect and may have been on file awaiting the judge's signature to complete it as a judgment. In Morris v. Patchin, 24 N. Y. 394, cited by the defendant, and in which such suggestion is made, the perfection of the record of judgment in proceedings transferred from one court to another was, by an Ohio statute, given in evidence, expressly made dependent upon the signature of the judge of the court to which such case was transferred. There is no such express requisite in this case. The court must give the record the same value as it would be given in Illinois. The United States Revised Statutes, after prescribing the method of authentication of judicial proceedings, provides: "And the said records and judicial proceedings, so authenti-

Digitized by Google

cated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken." The credit given to such judgment in the courts of the State of Illinois has been determined. In Habberton v. Habberton, 58 Ill. App. 99, 103, Presiding Justice Scofield says: "It is suggested that the decree was not signed by the judge. But the decree is of record and has not been impeached in any proper manner for fraud or mistake, and the signature of the judge is not necessary to its validity (Dunning v. Dunning, 37 Ill. 306; Agnew v. Lichten, 19 Bradw. 79)." Such determination is in accord with the decisions in this State. Clapp v. Hawley, 97 N. Y. 610; Good v. Daland, 119 id. 153, 156.

The third point urged by the defendant, that payment of the judgment should be conditioned upon the transfer of certain collateral, alleged in the counterclaim to be held by the plaintiff, has already been decided adversely to defendant by the Appellate Division of this court on his motion for a commission to examine certain witnesses without the State. The principles emphasized by the defendant governing the rights of sureties are inapplicable. They would only be applicable upon the assumption that the defendant was an accommodation maker or surety, and, therefore, entitled to collateral held by the plaintiff. The Illinois judgment has settled that claim against the defendant by rendering judgment against him as a principal. The question of fact or law determined by the Illinois judgment cannot be re-examined by other courts. Dunstan v. Higgins, 138 N. Y. 70. There is nothing in the counterclaim pleaded to establish that the plaintiff holds securities as collateral to which the defendant is entitled upon payment of the obligation which he incurred as principal. Motions to dismiss and for a new trial denied. Judgment may be entered upon the verdict in favor of the plaintiff. Defendant may have thirty days' stay, and thirty days to make a case.

Motion denied.

Digitized by Google

THE PEOPLE EX REL. NAN PATTERSON, Relator, *v.* WILLIAM FLYNN, as Warden, Etc., Respondent.

(Supreme Court, New York Special Term, June, 1904.)

Crimes — Code Crim. Pro., § 773 — When a coroner is justified in committing a person upon the ground of probable cause to believe that a homicide has been committed and that the person is chargeable with it — Issue of warrant when unnecessary.

An affidavit of a police officer, presented to a coroner upon an inquisition had by him in regard to the matter, stating that the officer found an unconscious man, dying from a pistol shot wound, with a revolver in his right hand pocket, lying in a hansom cab across the lap of a woman — whom, as appeared, the officer thereupon took into custody without a warrant — that the man died and that the officer was present at the autopsy, affords probable cause, within the meaning of Code Crim. Pro., § 773, to believe that a homicide has been committed and that the woman is chargeable with it and justifies the coroner in committing the woman in order to keep her in custody during the period of preliminary investigation.

The woman being in custody, there is no necessity for the coroner to issue a warrant.

HABEAS corpus proceedings.

Levy & Unger, for relator.

William T. Jerome, district attorney (Edward Sandford, assistant), for respondent.

CLARKE, J. To the writ of habeas corpus the keeper of the city prison makes return that he holds relator under custody as being the person named in a paper which is as follows:

"CITY AND COUNTY OF NEW YORK, *ss.:*

"Temporary Commitment to the Keeper of the City Prison and Bridewell, in said City.

"In the name of the People of the State of New York you are hereby commanded to receive into your custody, and safely keep for examination, the body of Nan Patterson,

Digitized by Google

who is charged, before me, with having caused the death of Cæsar Young.

"Coroner's Office, June 4, 1904.

"WM. JOSEPHS, JUNIOR, *Officer.*
"NICHOLAS T. BROWN, *Coroner.*"

To the writ of certiorari, addressed to the coroner, there has been returned to the court the original papers which, in view of the short time allowed for the return, were handed in instead of a formal, certified copy thereof, which, for the purposes of the record, may be hereafter supplied. Section 773 of the Code of Criminal Procedure provides: "Whenever a coroner is informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by the act of another by criminal means, or has committed suicide, he must go to the place where the person is and forthwith inquire into the cause of death or wounding, * * * summon not less than nine nor more than fifteen persons, qualified by law to serve as jurors, if such death or wounding be of a criminal nature, to appear before him forthwith at a specified place, to inquire into the cause of the death or wound, and if it shall appear from the sworn examination of the informant or complainant, or if it shall appear by the evidence taken on or during the inquisition or hearing, that any person or persons are chargeable with the killing or wounding, or that there is probable cause to believe that any person or persons are chargeable therewith, and if such person or persons be not in custody, he must forthwith issue a warrant for the arrest of the person or persons charged with such killing or wounding; and upon the arrest of any person or persons chargeable therewith, he must be arraigned before the coroner for examination, and the said coroner shall have power to commit the person or persons so arrested to await the result of the inquisition or decision." The papers disclose abundant justification for the institution of an inquiry by the coroner into the cause of death. The death occurred on

Digitized by Google

the morning of June 4, 1904. The writs were sued out at about four o'clock on the afternoon of Monday, June sixth. The record does not disclose that any jurors have been summoned, and, so such jurors had not appeared before the coroner, so far as the record shows, at the time of the issuance of the writ. The affidavit of the officer, who took relator into custody, does not, in terms, charge the relator with any crime; it simply narrates the circumstances attending the death. The coroner has power, after inquisition found, to issue his warrant, and also upon evidence taken during the inquisition to do the same. Upon such evidence he also may, after arraignment, commit the person arrested to await the result of the inquisition. The statute says: "If it shall appear from the sworn examination of the informant or complainant, or it shall appear from the evidence taken on or during the inquisition or hearing * * * that any person * * * is chargeable with the killing, or that there is probable cause to believe that any person is chargeable therewith, if such person be not in custody he must forthwith issue a warrant for the arrest." I am inclined to think that, if the affidavit of the officer be sufficient, the coroner was warranted in committing relator. She was in custody. Being in custody, there seems to have been no necessity for the issuance of a warrant to accomplish what already existed. The affidavit sets forth the finding of an unconscious man, dying from a pistol shot wound, with a revolver in his right-hand coat pocket, lying across the lap of a woman in a hansom cab; that the man died, and that the officer was present at the autopsy performed on his body. It was clearly a case of suicide or homicide. The position of the wound and the revolver seems to me to establish, within the meaning of the statute, probable cause to believe that it was homicide, and not suicide. Such facts appearing from the sworn examination of the informant upon his own personal knowledge, it seems to me that the coroner had warrant and that it was his duty, under the statute, to issue his commitment. The effect of the commitment is simply to keep in custody the person as to whom there is reasonable cause to believe is chargeable with the killing, through the period of preliminary investi-

Digitized by Google

gation. While the papers are not as clear and full as is desirable, yet I think they disclose all the substantial matters required by the statute. My conclusion is that the writ must be dismissed and the relator remanded.

Writ dismissed and relator remanded.

JAMES J. SHANDLEY, Plaintiff, *v.* ISRAEL LEVINE, LENA LEVINE and ESTHER BERRENT, Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Lis pendens — Cancellation — Validity of the cause of action not triable on the motion.

The right to file a notice of *lis pendens*, in a proper action e. g., one to compel specific performance of an executory contract for the sale of real estate, is an absolute right and the notice when once filed can be canceled only in the cases prescribed by Code Civ. Pro., § 1674.

The court has no right or power, upon a motion to cancel, to consider the question whether the action can be maintained as that question is for the trial or hearing.

MOTION to cancel a *lis pendens*.

Ralph Nathan, for motion.

Thomas E. Rush, opposed.

GIEGERICH, J. The action is brought to compel the defendants Levine to specifically perform an agreement, made December 16, 1903, to convey the real estate in question. The complaint further alleges: "That thereafter (that is, subsequent to December 16, 1903) the defendants Israel Levine and Lena Levine (his wife) conveyed to the defendant Esther Berrent the premises herein described, and said Esther Berrent is the owner of the record title of said premises at this time." The theory of the motion, as appears from the argument, is that the filing of the *lis pendens* was absolutely unwarranted, since Israel Levine was not the owner of the property, and no claim is made against the defendant

Digitized by Google

Berrent. The complaint alleges, however, that Israel Levine was the owner of the property on the date of the contract, to wit, December 16, 1903, and it is noticeable that in the moving affidavit the defendant Berrent contents herself with stating that title vested in her on the 28th day of January, 1904, without saying from whom she obtained the property. It is obvious that the action is of the character specified in section 1670 of the Code of Civil Procedure, and that the plaintiff, if he has any cause of action at all, was within his rights in filing the *lis pendens*. The circumstances under which a *lis pendens*, when once filed, can be canceled are prescribed in section 1674. There may be some question as to whether the allegations of the complaint are sufficient to affect the title in the hands of the defendant Berrent, but there can be no question, if the statements in the opposing affidavit are true, that facts exist which, if properly pleaded and proved upon the trial, will impeach her title, it being averred in such affidavit that she is the holder of the record title only of the premises in question by conveyance from the defendants Levine, and that the defendant Israel Levine continues to be the real owner. In Mills v. Bliss, 55 N. Y. 139, it was said: "The right to file a notice of *lis pendens* which shall be constructive notice to subsequent purchasers or incumbrances of the property affected thereby, is given in all actions affecting the title to real property. Code, § 132. This is an absolute right, not depending on the discretion of the court; and a notice once filed in a proper action, the court can only order canceled when the action shall be settled, discontinued or abated; that is, the court cannot interfere with it, or derogate from its efficiency as a notice affecting subsequent purchasers or incumbrances, so long as the action is pending and undetermined. * * * Whether the action can be sustained is not a question to be passed upon on this appeal. The plaintiff may fail to prove the facts alleged, or the court may hold that the action is untenable upon the facts stated * * *. The questions of fact as well as of law must be disposed of upon the trial and hearing of the cause. They cannot be determined upon an in-

Digitized by Google

terlocutory motion. That the action, upon the theory upon which it is brought and upon the complaint as framed, does affect the title to real property, asserting, as it does, a legal and equitable right to a lien thereon, cannot be questioned, and, upon the face of the complaint, the notice of *lis pendens* was properly filed." In Brainerd v. White, 12 Abb. N. C. 407 (at p. 413), the court said: "In this present case, if the motion had been granted, it would have been in consequence of the defendant contending that the plaintiff had not legal right to have the real estate charged, and of the court so holding. That would have been a determination of the plaintiff's cause of action against him. If, at the subsequent stage of the action, this was followed, the issues would practically be determined upon motion, instead of upon trial. Or, if it were not followed, the action might be sustained and the benefit of the notice gone. The matter cannot be heard upon motion. Under section 1670, the nature of the judgment which the action is brought to recover, is the description of the action in which a notice of *lis pendens* may be filed, and not the validity of the cause of action as described by the complaint." The doctrine of the above cases was reaffirmed in the more recent case of Beman v. Todd, 124 N. Y. 114, in the following language: "This right (of filing a *lis pendens*) was an absolute one, not resting in the discretion of the court, but conferred by statute, and having been properly filed, it cannot be canceled except pursuant to section 1674 of the Code of Civil Procedure." In the present instance there may be some question as to whether the complaint is sufficiently complete in its allegations to charge the defendant Berrent, and there may be some dispute as to the actual facts; but since the theory of the action is plainly such as is contemplated by section 1670, and the *lis pendens* has been properly filed, and none of the events prescribed in section 1674, namely, settlement, discontinuance or abatement of the action, or final judgment, or neglect to prosecute, has occurred, there are no facts which would warrant the granting of the relief sought.

Motion denied, with ten dollars costs.

Digitized by Google

WILLIAM G. BARSON et al., Plaintiffs, *v.* AGNES K. M. MULLIGAN et al., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Ejectment — Costs — Continuity of the original action not affected by a second new trial awarded under Code Civ. Pro., § 1525.

In an action of ejectment, it appeared that on the first trial a judgment entered on a verdict directed for the plaintiffs was reversed by the Appellate Division with costs to the defendants to abide "the event", that a judgment entered on a verdict directed for the plaintiffs on the second trial was affirmed by the Appellate Division and that on a third trial, obtained by the defendants under Code Civ. Pro., § 1525, a verdict was directed in their favor upon which they entered judgment. Upon a motion for retaxation of costs.

Held, that the identity and continuity of the original action were not affected or broken by the order for a second new trial made under Code Civ. Pro., § 1525, that "the event" contemplated by the order of the Appellate Division — the final result of the action in which the costs were awarded — had been in favor of the defendants and that the clerk was therefore correct in taxing in their favor the costs and disbursements of the first appeal.

MOTION for retaxation of costs.

Forster & Speir (Henry A. Forster, of counsel), for motion.

William G. Mulligan, opposed.

GIEGERICH, J. In an action of ejectment there have been three trials, and this motion for a retaxation brings up the question whether the clerk was right in taxing, as he did, the costs and disbursements of the first appeal to the Appellate Division. The course of the litigation has been as follows: Upon the first trial a verdict was directed for the plaintiffs, but upon appeal to the Appellate Division the judgment entered thereon was reversed, "with costs to the appellants to abide the event." 66 App. Div. 486. The costs thus awarded are the ones in controversy. At the second trial a verdict was again directed for the plaintiffs, and the judgment

Digitized by Google

thereon was affirmed by the Appellate Division. Thereafter the defendants moved for a new trial under section 1525 of the Code of Civil Procedure, and obtained an order granting such trial upon payment of all costs. 40 Misc. Rep. 470. The new trial thus obtained resulted in the direction of a verdict in favor of the defendants, and upon the taxation the clerk allowed the costs and disbursements of the first appeal to the Appellate Division which were awarded in the manner above stated. In support of the motion reliance is placed on certain expressions of the Court of Appeals in Wing v. De La Rionda, 131 N. Y. 422, 431, where, in reaching the conclusion that a second extra allowance could be allowed on a second new trial obtained under the section in question, the court said: "In taking a new trial under such circumstances and by virtue of the statute, the party availing himself of the privilege in effect commences or causes the commencement of a new action. * * *. Thus the new trial taken under the statute was, as I have said, in effect the bringing of a new action." The argument based upon this decision is that a new bill of costs and a new extra allowance may be recovered in the second action obtained under the statute, as if a new action had been brought, and consequently no part of the costs of the former trials or appeals can be recovered because the costs of one action cannot be recovered in another action. In the more recent decision made in Brown v. Root Mfg. Co., 148 N. Y. 294, 296, 297, the Court of Appeals has taken occasion to point out that the language above quoted from Wing v. De La Rionda should not be taken in too broad a sense, saying: "the judgment only is vacated and the new trial which is granted must be in the action," and holding that the Special Term was wrong in its theory that "the granting of the new trial in the action vacated all proceedings subsequent to the joinder of issue." Accordingly, the Court of Appeals ruled that a previous stipulation made for a trial before a referee held good after the plaintiff had obtained a new trial under section 1525. The result of these decisions seems to be that, while the taking of a new trial is to be deemed the bringing of a new action, as it were, for the purposes of an additional allowance, nevertheless, for

Digitized by Google

other purposes, the identity and continuity of the original action are no more affected or broken by an order for a new trial, obtained under the statute, than they would be by the same order obtained on appeal. In either case "the judgment only is vacated and the new trial which is granted must be in the action." Upon this theory, the "event" contemplated by the Appellate Division, viz., the final result of the action in which the costs were awarded, has been in favor of the defendants, who now become entitled to tax such costs.

Motion denied, with ten dollars costs.

HENRY P. GOFF, Plaintiff, *v* ELIE S. CHARLIER, Defendant.

(Supreme Court, New York Special Term, June, 1904.)

Motion to vacate an order of arrest — Construction of Code Civ. Pro., § 572, providing for the defendant's discharge "if the plaintiff unreasonably delays the trial of the action".

The word "delay", as used in Code Civ. Pro., § 572, entitling a defendant under arrest in a civil action to be discharged from imprisonment "if the plaintiff unreasonably delays the trial of the action", means more than a mere neglect to proceed and must be held to intend a positive act in the way of obstruction.

Where both parties to an action, in which the defendant has been incarcerated under an order of arrest, might have, but neither ever has, filed a note of issue or served a notice of trial to put the case in a position where it could be tried, the defendant cannot be heard to say, on his motion to vacate the order, that it should be vacated because the plaintiff has unreasonably delayed the trial.

MOTION to vacate an order of arrest.

George W. Sandford, for motion.

John Baptist Marshall, opposed.

GIEGERICH, J. This application to vacate the order of arrest of the defendant, who is now in custody, is based upon two grounds: *First,* that the plaintiff has unreason-

Digitized by Google

ably delayed the trial of the action, and, *second,* upon the merits. As to the first ground of objection, the facts are as follows: The order of arrest was issued on the 22d day of June, 1903. The summons and complaint were served on the defendant on the 13th day of August, 1903, and the answer was served on the second day of September following. The order of arrest was served by the sheriff on the 19th day of May, 1904, and the defendant is now incarcerated. The plaintiff has never filed a note of issue nor served a notice of trial. Section 572 of the Code of Civil Procedure provides that a defendant under arrest must, upon his application, be discharged from custody if the plaintiff has unreasonably delayed the trial of the action. In the present case it may be that there has been unreasonable neglect to prosecute the action, but there is nothing whatever to show that there has been any affirmative act, on the part of the plaintiff, which the word "delay," as used in the section referred to, was, in my judgment, intended to import. The expression "neglects to proceed" is a familiar one in the Code of Civil Procedure and exactly describes what the plaintiff did in this case. On the other hand, although the word "delay" in its ordinary sense may not imply any positive act in the way of obstruction, it should, I think, be held, in the section referred to, to have such significance. In the present case it was as much within the power of the defendant's attorney as of the plaintiff's to serve a notice of trial, put the cause on the calendar and bring it on for trial, consequently whatever delay has taken place is as much the fault of the one side as of the other. In my opinion the statute did not intend to permit a defendant to take advantage of a delay which he himself had consented to or contributed to. I have not been able to find any case directly in point, but in Howell v. Taussig, 12 Civ. Pro. 252, 254, it was held by the General Term of this department that the mere fact that the action was commenced in 1883 and had not been tried in 1887 was not enough to prove that the defendant had unreasonably delayed the trial, that being, as the court remarked, "a fact to be affirmatively established in support of the application before it is allowed to prove

Digitized by Google

successful." Neither do I think that the defendant has made out a case for vacating the order of arrest upon the merits. The motion should, therefore, be denied, but without costs.

Motion denied, without costs.

ABRAHAM GOODKIND, Plaintiff, *v.* THE METROPOLITAN STREET RAILWAY CO., Defendant.

(Supreme Court, New York Special Term, June, 1904.)

Costs — When a trial occupied more than two days.

On May 23rd, the attorney for the plaintiff in an action examined and accepted the jury and the attorney for the defendant while examining them on that day stated to the justice presiding that the counsel who was to try the action desired an adjournment until the next day. Thereupon the justice stated in court that the case was to be considered on trial in that part of the court and it appeared in the New York Law Journal of May 24th as on trial in that part of the court on the previous day and as "unfinished." The case was tried on May 24th and 25th.

Held, that the clerk was correct in taxing for the successful party an item of ten dollars costs for a trial occupying more than two days.

MOTION for a retaxation of costs.

Henry A. Robinson (Lee Parsons Davis, of counsel), for motion.

Otto Horwitz (Nathan G. Goldberger, of counsel), opposed.

GEIGERICH, J. The defendant insists that the clerk was in error in taxing the item of ten dollars for trial occupying more than two days. The facts are undisputed, and both sides concede that the question presented is a new one. That the case was actually on trial on the twenty-fourth and twenty-fifth days of May is not disputed, the controversy being as to whether the occurrences on May twenty-third were such as to warrant the conclusion that the case was on

Digitized by Google

trial upon that day also. The jury was examined by the plaintiff's attorney, and was accepted on the twenty-third. Thereafter, on the same day, the attorney for the defendant examined the jury, and in the midst of such examination stated to the justice presiding that the counsel who was to try the action was not prepared to go on and desired an adjournment until the next day. The court then stated that counsel in the case should consider themselves engaged for the trial of the action in that part of the court and the case considered on trial in that part. No objection was made by either party to such ruling. On May 24, 1904, there appeared in the Law Journal the following: "Supreme Court — Trial Term, Part VII. Before MacLean, Judge — Goodkind v. Met. St. R'y. O. Horwitz for plaintiff; H. A. Robinson for defendant. Case unfinished." Under these circumstances I think it quite clear that the clerk was right in considering that the trial began on the twenty-third and occupied more than two days.

Motion denied, with ten dollars costs.

RALPH RAYMOND, Plaintiff, *v.* THE SECURITY TRUST AND LIFE INSURANCE CO., THE AMERICAN UNION LIFE INSURANCE CO., FRANCIS HENDRICKS, as Superintendent of Insurance, and ALBERT B. OVITT, as Receiver of THE AMERICAN UNION LIFE INSURANCE CO., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Corporation — Action by a judgment creditor, on behalf of a receiver appointed in sequestration proceedings, to set aside an illegal transfer made by the corporation — Status and power of such a receiver — When a transfer is not a reinsurance and is an illegal act terminating the life of the corporation — Disposition of a trust fund of $100,000 in bonds deposited with the state superintendent of insurance in accordance with law.

A receiver, of a trust and life insurance company organized under article II of the Insurance Law, appointed in sequestration proceedings instituted under Code Civ. Pro., § 1784, represents the stockholders, policy holders and creditors of the corporation, is

Digitized by Google

vested with title to all its property and choses in action and may maintain an action to set aside an illegal transfer of all its property made by it or its officers.

A transfer made by the corporation of all its assets, which constitute a trust fund for the payment of its debts and upon which creditors have a lien against stockholders and all transferees except *bona fide* purchasers, including $100,000 in bonds deposited by it under section 71 of the Insurance Law with the state superintendent of insurance as a condition of its being permitted to do business, to a transferee upon its agreement to assume liability on all outstanding policies, pay all death losses reported, as per schedule attached to the contract, and certain named commissions to agents as well as rents named, is, where the transferee must be deemed to have known that the transfer would make the corporation unable to pay its debts and terminate its existence by depriving it of all means of carrying into effect the object of its existence, and where the transfer is made against the will of a considerable number of stockholders and leaves a certain number of creditors unprotected, not such a reinsurance as is contemplated by section 22 of the Insurance Law but is as to creditors an illegal transaction which must be set aside.

A judgment creditor of the corporation, with execution returned unsatisfied, suing in form on behalf of himself and for all other creditors and such stockholders of the corporation as may come in and be made parties, but in effect for the receiver, who is a party to the action, may maintain an action to set aside the transfer and to restrain the superintendent of insurance from transferring the $100,000 in bonds, and the income thereof, to the fraudulent transferee. However, the superintendent of insurance cannot be required to pay over this fund, which is a trust fund on which policy holders have a first lien, to the receiver, because the superintendent is a statutory trustee and the distribution of that fund should be made by the superintendent himself; but the court, having acquired jurisdiction over the superintendent in this action, can direct such disposition by him of the trust fund as the law and the facts of the case may require.

ACTION to set aside a transfer.

Goodale, Hanson & Price, for plaintiff and for receiver.

Blandy, Mooney & Shipman, for Security Trust and Life Insurance Co., and American Union Life Insurance Co.

GILDERSLEEVE, J. The plaintiff recovered a judgment against the defendant, the American Union Life Insurance Company, in April, 1902. Execution thereon was issued and

Digitized by Google

returned wholly unsatisfied. Some months thereafter the plaintiff brought this action "on behalf of himself and all other creditors of the American Union Life Insurance Company, who may come in and be made parties hereto, and also on behalf of such stockholders of said corporation as may come in and be made parties hereto," against the Security Trust and Life Insurance Company, the American Union Life Insurance Company, Francis Hendricks, as superintendent of insurance, and Albert B. Ovitt, as receiver of the American Union Life Insurance Company, to set aside a certain contract made on February 18, 1901, between the two life insurance companies. By this contract the American Company transferred to the Security Company all of its assets, including $100,000 in bonds, deposited with the superintendent of insurance for the benefit of the policyholders, as required by section 71 of the Insurance Law, and the security company agreed in return to assume all the liability of the American Company to "its living policy holders in good standing, of any kind or nature whatsoever, as evidenced by its schedule of policies hereto attached, * * * and to pay all death losses reported, as per schedule hereto attached and made a part of this agreement; all agency renewal contracts on business in force, not exceeding on an average 7½% per annum; the rent of the home office, Nos. 9 and 11 Broadway, City of New York, from and after this date to May 1, 1901, at the rate of $5,000 per annum; and the rent of agency offices, as per schedule hereto attached and made a part hereof." The said contract further provided as follows: "This contract, from the date and hour of its execution, to wit, 3 o'clock P.M. on the 18th day of February, 1901, shall be obligatory on both parties and their successors and assigns, subject only to the ratification thereof by the stockholders of the American Union Life Insurance Company, at their meeting for February 26, 1901; and a verification of the schedules hereto attached by the Security Trust & Life Insurance Company." Annexed to the contract are schedules showing death losses, amount of income policies, bonds and stocks, amount of cash,

Digitized by Google

mortgages, notes and rentals. This action was commenced by the service of a summons, without the complaint, and before the appointment of the receiver. As soon, however, as the receiver was appointed the summons was amended by making him a party, and thereafter the complaint was prepared and served. The plaintiff and the receiver appear by the same attorneys, and the answer of the receiver admits all the allegations of the complaint. The complaint and the answer of the receiver also demand the same relief, i. e., the setting aside of the said contract and the payment of the assets of the American Company to the receiver. The plaintiff demands no relief personal to himself, but seeks, as we have seen, a judgment for the benefit of the receiver. The relief demanded by the plaintiff and the receiver against the superintendent of insurance is for a judgment restraining him from transferring the said $100,000 in bonds, deposited with him, under section 71 of the Insurance Law, by the American Company, to the Security Trust and Life Insurance Company, and directing him to transfer and deliver to the receiver said bonds and the income thereof, "due regard being had for the lien which policy holders of the American Union Life Insurance Company may have on said bonds," and directing him to account for said bonds and the income thereof, and to pay to the receiver any amount which may be found to be due, and restraining him, together with the other defendants, "from doing any act whatsoever in violation of the rights of the plaintiff and other creditors and the stockholders of the American Union Life Insurance Company, or in violation of the rights of Albert B. Ovitt, as receiver of the American Union Life Insurance Company." The said superintendent of insurance has not appeared in the action. The American Union Life Insurance Company appeared voluntarily in the action after the receiver had been made a party thereto. At the meeting on February 26, 1901, of the stockholders of the American Company, 3,253 shares of stock out of a total of 5,000 shares of the company were represented. Of these 3,253 shares there represented, 1,290 were represented by their owners in person and 1,963 shares were present by proxy. Of the

Digitized by Google

1,290 shares represented by the owners in person, 395 shares were voted against the ratification of the contract and 895 were voted in favor of it. Of the 1,963 shares present by proxy, 20 shares were voted against the ratification of the contract and 1,943 shares were voted in favor of it. The legality of the contract is questioned by the plaintiff on a number of grounds.

We are first, however, confronted by some preliminary objections, strongly urged by defendants, which must be overcome before we can properly discuss the merits or legality of the contract itself. As we have seen, the plaintiff is a judgment creditor, and he claims, by the wording of his complaint, to sue on behalf of all creditors and stockholders of the American Company who may come in and be made parties to the action. The receiver was not appointed in dissolution proceedings, but in sequestration proceedings instituted under section 1784 of the Code. As we have seen, the plaintiff's prayer asks no personal benefit, but merely and solely demands judgment in favor of the receiver, and the plaintiff herein can obtain no undue advantage over other creditors of the American Company from a judgment in his favor in this action. See People v. Loan Co., 177 N. Y. 231, 467; 41 App. Div. 535; 54 id. 168, 171, 174; 157 N. Y. 166, 181; 85 Hun, 99, 102; 99 N. Y. 185, 194. I think, therefore, we must treat this action substantially as one brought on behalf of the said receiver. But what is the power of a receiver in sequestration proceedings? Whom does he represent? What are his relations to the policy-holders and stockholders? These preliminary questions first demand our consideration. Section 1784 of the Code reads as follows: "Where final judgment for a sum of money has been rendered against a corporation created by or under the laws of the State, and an execution, issued thereupon to the sheriff of the county * * * has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action to procure a judgment, sequestrating the property of the corporation, and providing for a distribution thereof, as prescribed in section 1793 of this act." The latter section provides thus: "A final judgment in an action, brought

Digitized by Google

against a corporation, as prescribed in this article, * * * must provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its fair and honest creditors, in the order and in the proportions prescribed by law, in case of the voluntary dissolution of a corporation." Are we to infer from this statutory provision, as urged by defendants' counsel, that the receiver in sequestration proceedings represents only the creditors of the corporation? If so, what, are we to say of the position of the policy-holders and stockholders in the case at bar? The policy-holders have a first lien upon the $100,000 in bonds deposited with the superintendent of insurance, under section 71 of the Insurance Law. What rights would the receiver have over this fund? Suppose there should be a surplus after the payment of all obligations to the creditors, would the receiver have power to distribute that surplus among the stockholders, or would his powers cease after the claims of the creditors had been satisfied? Section 1793 of the Code, as we have seen, merely provides for the distribution of the assets among the creditors in the order prescribed in dissolution proceedings. This order is as follows: "(1) All debts entitled to a preference under the laws of the United States; (2) judgments actually obtained against such corporation to the extent of the value of the real estate on which they shall respectively be liens; and (3) all other creditors of such corporation, in proportion to their respective demands, without giving any preference to debts due on specialties." See Birdseye Rev. Stat. (2d ed.) 685; (3d ed.) 760, § 127. There is nothing here to indicate the position of the receiver in sequestration proceedings in respect to the policy-holders and stockholders. With receivers appointed in dissolution proceedings or general receivers the law is very definite. Such a receiver of an insolvent corporation represents the corporation which was the custodian of the property and assets for the benefit of stockholders and creditors, and he also represents those creditors and stockholders, and in case of an insolvent life insurance company, he is the trustee of and represents the creditors and all interested in the fund, including the policy-holders. See Mason v. Henry, 152 N. Y.

Digitized by Google

537. Such a receiver can disaffirm and maintain an action to set aside illegal or fraudulent transfers of the property of the corporation, made by its agents or officers, or to recover its funds or securities invested or misapplied. See Atty.-Gen. v. Guardian M. L. Ins. Co., 77 N. Y. 275. The defendants' counsel, however, urge that in none of the cases covered by the authorities is the receiver one appointed in sequestration proceedings, and that these authorities do not apply here. Section 1788 of the Code provides that a permanent receiver in an action brought, as prescribed in article 3 of chapter 15, title 2 of the Code, which includes an action under section 1784 for sequestration, "has all the powers and authority conferred * * * upon a receiver appointed upon the voluntary dissolution of a corporation." See section 1788, taken in connection with sections 1784, 1787. The receivers in voluntary dissolution proceedings "shall be vested with all the estate, real and personal, of such corporation * * * and shall be trustees of such estate for the benefit of the creditors of such corporation and of its stockholders." 2 Rev. Stat. m. p. 469, § 67 (Birdseye [3d ed.], p. 758, § 115). "Such receivers shall have all the power and authority conferred by law upon trustees to whom an assignment of the estate of insolvent debtors may be made." Id., § 68. Such receivers have authority to bring actions to set aside illegal transfers and represent all interested in the funds of the corporation. Cases above cited; Birdseye Rev. Stat. (2d ed.) 683, 693. See also Rich v. Sargent Granite Co., 23 Civ. Pro. 361, note. We, therefore, reach the conclusion that the receiver, in the case at bar, represents both creditors and stockholders, and that he can maintain an action to set aside the transfer in question. Hurd v. N. Y. & C. S. L. Co., 167 N. Y. 89. We have seen that the case at bar must be treated as one brought on behalf of said receiver. In referring to the effect upon the *status* of a corporation produced by sequestration proceedings, Mr. Justice Cullen said: "The provisions of the present Code, that the property, after the payment of the creditors, should be distributed among the stockholders instead of being returned to the corporation, would seem to indicate that a final decree of

Digitized by Google

sequestration works a practical dissolution of the corporation." Eddy v. Co-operative Dress Assn., 3 Civ. Pro. 442. The General Term of the former Superior Court held that "The decree of sequestration * * * in effect closed the career of the corporation, and its corporate life then came to an end." Tockerson v. Chapin, 52 N. Y. Super. Ct. 16, 19. Although an actual statutory dissolution of the corporation is not brought about by sequestration proceedings, still a decree of dissolution could be easily obtained in an action brought under section 1785 of the Code, should such dissolution be required; and even assuming that the receiver in sequestration proceedings would be without power to do more than pay the creditors, and that he could not distribute the surplus, if any, among the stockholders, he could, under order of the court, pay such surplus into court to await the result of an action brought under section 1785 of the Code for a dissolution of the corporation. So far as the policy-holders are concerned, they have, of course, a first lien upon the $100,000 in bonds deposited with the superintendent of insurance, under section 71 of the Insurance Law; but with regard to the surplus of such fund, if any there be after satisfying their lien, and with respect to the remaining assets of the corporation, I do not see how they stand on any better footing than the creditors. The lien of the stockholders is, of course, subordinate to that of the policy-holders and that of the creditors. All these classes must be held to be represented here by this receiver, who is vested with the title to all the property and choses in action of the corporation. Hurd v. N. Y. C. S. L. Co., 167 N. Y. 91. While, however, the receiver may be thus said to represent the policy-holders in their capacity of creditors, still, so far as the distribution of the trust fund of $100,000 is concerned, I do not think that the superintendent of insurance can be required to pay over that fund to this receiver. The distribution of that fund should be made by the superintendent himself. People ex rel. Ruggles v. Chapman, 64 N. Y. 557; Ruggles v. Chapman, 1 Hun, 324; affd., 59 N. Y. 163, 165; People v. Am. Steam Boiler Ins. Co., 147 N. Y. 25; Matter of Guardian Mut. Life Ins. Co., 13 Hun, 115; affd., 74

Digitized by Google

N. Y. 617. The superintendent is a statutory trustee, and the fund was deposited with him for a specific purpose. Until that trust is executed neither can the superintendent be compelled to surrender the securities nor may he surrender them voluntarily, and his possession will not be disturbed in the absence of misconduct on his part. It is true that section 76 of the Insurance Law provides that, under certain conditions and circumstances, an action may be brought by the Attorney-General, and that, where it appears that the assets and funds of the corporation are not sufficient to justify its further continuance in business, the court shall enjoin the corporation from further carrying on its business and shall appoint a receiver, who "shall take possession of all such assets and credits, including the securities deposited in the insurance department;" while section 77 provides for the converting of these securities into money by the superintendent of insurance and the payment of the proceeds to the receiver. The securities, however, referred to in sections 76 and 77 are not the securities deposited under section 71 of the said Insurance Law, but sections 76 and 77 refer to insurance companies which have made special deposits to secure registered policies and annuity bonds under the provisions of section 73 of the said law. People v. Am. Steam Boiler Ins. Co., 147 N. Y. 25; People ex rel. Stout v. Chapman, 5 Hun, 222. In the case at bar the $100,000 in bonds were deposited, as we have seen, under section 71 of the Insurance Law, so that this receiver has not the power over the said fund that is conferred by said law upon receivers appointed under section 76. The receiver of an insurance company has the powers over the trust fund conferred by sections 76 and 77 only where the company has made a special deposit under section 73 and issued registered policies and annuity bonds. The court, however, has acquired jurisdiction over the superintendent of insurance in this action, and can direct such disposition by him of the trust fund as the law and facts of the case may require. 1 Hun, 324; 5 id. 222; 92 N. Y. 654; 129 id. 288.

Having disposed of the preliminary questions presented herein, we must now consider the merits and legality

Digitized by Google

of the transfer itself. Counsel devote much discussion to the effect of section 48 of the Stock Corporation Law upon the transfer in suit. I do not think, however, that this statute, as it stood at the time of the transfer, in February, 1901, has any application to the facts shown by the evidence in the case at bar. The decision of the controversy here presented must rest upon other grounds. The assets of the American Company constituted a trust fund for the benefit of its creditors, and the assignment, disposing of such fund so that the creditors, other than those covered by it, could not benefit by their lien, was a fraud upon those creditors and they may set the assignment aside and follow the assets. In the case of Cole v. Millerton Iron Co., 133 N. Y. 164, it was held that the assets of a corporation are a trust fund for the payment of its debts, upon which its creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value; and that a transfer by a corporation of all its property and effects, which has the effect of terminating the regular business of the corporation and was made and accepted by its transferee with that purpose, is illegal as against creditors of the corporation. In that case the only consideration for the transfer was the assumption by the transferee of the debts of the transferrer. The court held also that it was no answer to the alleged illegality of the transfer that the creditor was not harmed by the change of debtor, and it was further held that where the parties to such transfer know that its necessary effect will be to make the corporation unable to pay its debts, they will be held to have intended that consequence of their acts, and the transfer is illegal. While section 22 of the Insurance Law permits an insurance company to reinsure the whole or any part of any policy obligation in any other insurance corporation, the transfer in question was not merely a reinsurance, for the security company assumed considerably more than the policy obligations of the American Company, while the latter transferred all of its assets, leaving a certain number of creditors entirely unprotected. The only consideration for the transfer was, as we have seen, the assump-

Digitized by Google

tion of a part of the debts and obligations of the American Company, including the policy obligations. The security company was not a transferee in good faith, because, although it knew it was taking all the assets of the American Company, it failed to provide for the payment of all the creditors of the latter company. It was the duty of the security company to see that no creditor was deprived of all means of payment, and it must be held that it had at least constructive knowledge that there were creditors unprovided for, since Mr. Super, who alone represented the security company in the transaction, had been long in the insurance business and knew that an insurance company employs agents, lawyers and medical examiners throughout the country, and he should have ascertained whether or not the American Company was indebted to some of these, but he made no such inquiry. A glance at the agents' ledger or other books of the American Company would have shown such indebtedness. The evidence shows that the said Super made no examination or inquiry whatever as to any liability of the American Company, but accepted without question those set forth in the schedules annexed to the transfer as the only obligations of the American Company. There is no evidence or claim that the said Super was misled by any representations or assertions of the representatives of the American Company. The transfer was a fraud upon the unprotected creditors of the American Company, and the transferee as well as the transferrer must be deemed to have known that the necessary effect of the transfer would be to make the American Company unable to pay its debts. Said transfer, therefore, was illegal under the authority of Cole v. Millerton Iron Company, *supra*. The power to reinsure was given for the protection of corporations and to enable them to continue their business in safety, and not as an instrument of destruction. As we have seen, the transfer of all its property by the American Company put it out of business and practically brought its corporate existence to an end. It has held no meetings, done no business and been without any assets. Executions against it have been issued and returned unsatisfied, and a receiver has been appointed. We

Digitized by Google

have also seen that the contract was not ratified by all the stockholders, but that a number of shares were not voted at all and a considerable percentage of the shares was voted against such ratification. The case of People v. Ballard, 134 N. Y. 294, was one in which the trustees of a domestic corporation transferred all its property to another corporation, organized at the time under the laws of the State of California, for the purpose of carrying on the business theretofore conducted by the domestic corporation and of taking title to its assets. This was done with the approval of stockholders holding a majority of the stock, in good faith, to save the property from sacrifice, but without the consent of the holders of a large number of shares and against the protest of some of the stockholders. The sole consideration for such transfer was an agreement by the California company to pay the debts of the New York company, and to issue to it certain shares of its capital stock. Judge Vann, in delivering the opinion of the court, said: "A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed a dissolution. The law made it and the law only can put an end to it. As it cannot take its own life directly, it cannot do so indirectly, for that would be a fraud upon the law and against public policy. By the transaction complained of the company was stripped of all its property and thus prevented from going on in business and deprived of all means of carrying into effect the object of its existence. While a corporation may sell its property to pay debts, or to carry on its business, it cannot sell its property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement * * * for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate. Whether the process by which it was sought to convert the New York corporation into a California corporation is called reorganization, consolidation or amalgamation, it was the exercise of

Digitized by Google

a power not delegated and was void. It was corporate burial in New York for resurrection in California. * * * All the authorities in this state are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated. * * * The fact that the trustees acted in good faith did not empower them to do an illegal act; and the fact that there may be some difficulty in the final adjustment of rights, because some of the stockholders consented, while others did not, constitutes no defense to the action. * * * We think that the transfer was unauthorized and void as to the non-assenting stockholders, and as to the state." In the case of Abbott v. American Hard Rubber Co., 33 Barb. 578, which is cited with approval in the foregoing opinion of Judge Vann, it was held that a transfer of all the personal property of a business corporation, without the consent of some of its stockholders, which practically terminated the corporation by taking from it the power to fulfill the object of its organization, was a violation of that object and was not within the power of the trustees, and was void as *ultra vires*. The case of Hurd v. N. Y. Steam Laundry Co., 167 N. Y. 91, was brought by a receiver of a corporation, appointed in sequestration proceedings, to set aside the sale of the plant of the corporation to another corporation. It was there held that where the rights of a creditor have intervened a corporation has no power, even with the consent of all its stockholders, to sell its plant to another corporation and to retire from business, without regard to the debt to the creditor, since the creditor has the right to rely upon its assets for the payment of his debt and has an equitable lien thereon, both as against stockholders and all transferees, except those purchasing in good faith and for value. I am of opinion that the transfer in the case at bar of all the property of the corporation, leaving certain creditors unprotected, and carried into effect against the will of a considerable number of its stockholders, was not such a reinsurance as is contemplated by section 22 of the Insurance Law, but is an illegal trans-

Digitized by Google

action and must be set aside. The form of the findings and judgment will be settled on notice to all parties and the question of costs and allowances will be determined at the time of settlement.

Judgment accordingly.

HENRY JACKSON, Plaintiff, *v.* BERTHA JACKSON, as Administratrix, Etc., Defendant.

(Supreme Court, New York Special Term, June, 1904.)

First Judicial Department — Special term calendar — Preference where an administratrix is the sole party defendant — Distinction as to preferences on the trial and special term calendars.

Where an administratrix moves under Code Civ. Pro., § 791, subd. 5, for a preference on the special term calendar as being the sole party defendant in the action and the motion is made on the papers and proceedings and pleadings and a copy of the latter is on the motion handed up to the court, it has before it unquestionable proof that the administratrix is the sole party defendant and therefore entitled to the preference, and the rule, of some cases, that a right to a preference will not be inferred from the mere fact that the title of the action indicates that the plaintiff or defendant is an administrator, has no application.

The further rule, that the statutory preference given by said section cannot, without some additional reason, be permitted to advance an action on the trial term calendar of the First Judicial Department over issues noticed for trial at prior trial terms, does not apply to any extent to the special term calendar in that department, as the latter calendar is kept up to date while the former is much behind in the disposition of actions pending.

MOTION for a preference on the Special Term calendar.

Jacob J. Aronson, for motion.

John Bogart, opposed.

GILDERSLEEVE, J. The plaintiff served a notice of motion for a preference, which notice stated that the motion was

Digitized by Google

made on the pleadings, and all papers and proceedings in the action, and that the claim for a preference was based upon the ground that an administratrix is the sole party defendant, which fact entitles plaintiff to a preference under section 791, subd. 5, of the Code. The defendant opposes the motion on the ground that no copy of the pleadings or affidavit was annexed to the notice, "reciting why the above entitled action should be preferred." In support of this contention the learned counsel for defendant cites the cases of Marando v. Gillespie Co., 54 App. Div. 488, and Roberts v. Jenkins, 52 id. 491, in which it is held that "the right to a preference upon the calendar will not be inferred from the simple fact that the title of the action indicates that the plaintiff (or defendant) is an administrator." It appears from the language of the opinion in each of these cases that the record before the appellate court did not contain the pleadings or anything from which the court was able to determine that the plaintiff was entitled to the preference claimed. In the case at bar the notice, as we have seen, stated the grounds for a preference and based the motion upon the pleadings, of which, of course, defendant's attorney had a copy, and of which a copy is handed up to the court on this motion. There is, therefore, unquestionable proof before the court that an administratrix is the sole party defendant, and that the plaintiff is entitled to have the cause given a preference under section 791, subdivision 5, of the Code. It is very clear, therefore, that the authorities of Marando v. Gillespie and Roberts v. Jenkins do not apply here. The learned counsel for the defendant further objects that no particular reason is given for a preference beyond the statutory claim, and in support of this objection he cites the Trial Term decisions of Eising v. Young, 38 Misc. Rep. 12, and Davis v. Westervelt, id. 13, where it was held that the statutory preference given by section 791 of the Code will not be permitted to advance an action on the Trial Term Calendar of the First Department over issues noticed for trial at prior Trial Terms, but that to secure such a result some additional reason must appear, and that such action is, otherwise, only entitled to a preference over other issues

Digitized by Google

of the same term as that for which it is noticed. This rule applies to the Trial Term practice, but it has at present practically little application to the practice of the Special Term, for the reason that the same state of facts and condition of affairs do not exist with reference to the Trial and Special Term Calendars in the First Department, inasmuch as the latter calendar is kept up to date, while the former is much behind in the matter of the disposition of actions pending. Finally, the learned counsel for defendant alleges that this action is only for the sum of $278, and should have been brought in the Municipal Court. I do not think, however, that a denial of a motion for a preference should be based solely upon this ground. As no other valid reason is offered for a denial of the motion, it follows that this application for a preference should be granted. An order may be handed up granting the motion for June 22, 1904.

Motion granted.

HARRY T. GAUSE, Plaintiff, *v.* THE COMMONWEALTH TRUST CO. of New York, Defendant.

(Supreme Court, New York Special Term, June, 1904.)

Action against a corporation, organized under the Banking Law, for a breach of its covenant that on or before a certain date the plaintiff should receive a certain sum of money for certain securities and that the date had passed without payment — Sufficiency of the complaint — Demurrer to defenses — Ultra vires not a defense to a corporation where the other party has fully executed the contract — When the contract is not against public policy nor mala in se, or mala prohibita within section 159 of the Banking Law — When a defense that the plaintiff had not marketable title is bad — Defense of false representations, to the effect that certain stocks were not assessable, when demurrable — Counterclaim for deceit, when demurrable — When admissible under Code Civ. Pro., § 501.

A complaint, against a domestic corporation organized under the Banking Law, which alleges that the plaintiff owned stocks and bonds of a ship building company, on August 28, 1902, put them at the disposal of the defendant giving it a right to sell them according to its judgment and discretion, that the defendant agreed that on or before August 25, 1903, the plaintiff should receive

Digitized by Google

for them a named sum of money, that the plaintiff placed them at the disposal of the defendant and made no further attempt to sell them and tendered them repeatedly to the defendant and that August 25 passed without payment, states a cause of action.

Further held, that, a first separate defense alleging that the contract was *ultra vires* of the corporation, was demurrable as the plaintiff had fully executed the contract, even though he was still in possession of the securities.

That, the contract was not void as against public policy or *mala in se.*

That, it was not *mala prohibita,* within section 159 of the Banking Law, prohibiting such a corporation from holding stock in any private corporation to an amount in excess of ten per cent of the capital of the corporation holding such stock; and that, beyond that, nothing in the contract showed that the securities were intended by the parties to constitute part of the capital of the defendant, or that the defendant was intending, or that the plaintiff knew the defendant was intending, to invest any trust funds in the stock of the ship building company.

Third and fourth separate defenses, alleging that the plaintiff was a director and large stockholder in a Delaware corporation and cognizant of its affairs, that, by false representations he succeeded in selling that corporation to the ship building company, receiving payment in part in securities of that company and in part in cash, and that, although he covenanted that the Delaware corporation should, when sold, be free from debt and liens, except as specially provided and excepted, it was not so free, do not tend to establish allegations of these defenses that the plaintiff received the securities, he placed at the disposal of the defendant, fraudulently and had not and could not make marketable title to them.

Assuming that the ship building company might have rescinded, the plaintiff's title was good as far as the defendant was concerned.

These defenses are bad as resting on a contingent defeasability of title which has not become actual.

A fifth separate defense, repeating the allegations of the third and fourth separate defenses, and then alleging that, when the contract was made, the plaintiff knowingly falsely represented the stocks of the ship building company as full paid and not assessable and that, on the contrary, the holder "was liable for further assessments * * * by reason of the allegations in the foregoing Third and Fourth defenses of the defendant", is bad where examination of those defenses discloses that they contain nothing to show that the stocks were not fully paid, and where the statute in that regard, of the State of the domicile of the ship building company, has not been pleaded.

Digitized by Google

A counterclaim, which alleges a consummated contract made between the plaintiff and other stockholders of the Delaware corporation and one Nixon or others, by which the properties of that corporation were to be sold and which further alleges that, in order to induce the defendant to advance to the plaintiff the cash part of the consideration, the plaintiff made false representations to the defendant, and that it, relying thereon, paid out the cash to assist Nixon or the others, with the result that the money was "wholly lost to the defendant", while admissible under Code Civ. Pro., § 501, is demurrable, as the claim is for deceit and no facts are alleged from which it can reasonably be inferred that the money was "wholly lost to the defendant."

The mere fact, that advances were made to a third party on the plaintiff's false representations, does not *per se* establish loss in any amount to the defendant.

DEMURRERS to answer and counterclaim.

Taylor, Anderson & Seymour (Howard A. Taylor, of counsel), for plaintiff.

Francis S. Hutchins (C. La Rue Munson, of counsel), for defendant.

LEVENTRITT, J. This case presents for consideration four demurrers to as many separate defenses in the answer, and a fifth demurrer to a counterclaim.

The complaint alleges substantially the following facts: On August 28, 1902, the plaintiff, who was then the owner of certain stocks and bonds of the United States Shipbuilding Company entered into an agreement in writing with the defendant whereby he agreed to and did put the stocks and bonds at the disposal of the defendant, giving it the exclusive right to sell them according to its judgment and discretion. The defendant agreed to undertake the sale, covenanting that it would be accomplished on or before August 25, 1903, and that the plaintiff would receive by that date for the stocks and bonds a stated price which after deducting ordinary brokerage expenses would amount to $404,630. The plaintiff at once placed the securities at the disposal of the defendant and refrained either personally or through agents from making any effort to sell them. The securities have

Digitized by Google

always been and now are at the defendant's disposal, held at its request and subject to its order. The plaintiff is ready and willing to turn them over to the defendant and has made repeated tender. August 25, 1903, having come to pass, prior to the commencement of this action, without payment by the defendant, the plaintiff lays his damage in the sum of $404,630, for which he prays recovery.

To this complaint the defendant interposes five separate defenses and a counterclaim. The plaintiff demurs to all with the exception of the defense pleading lack of authority in those assuming to execute the contract on behalf of the defendant. Before taking up the defenses and the counterclaim it is necessary briefly to examine the complaint, as the defendant invokes the rule that a demurrer searches the record to condemn the first defective pleading. Baxter v. McDonnell, 154 N. Y. 432, 436.

The defect charged is that the complaint in assigning the breach does not negative the covenant declared on. As I read the complaint, however, the defect is nonexistent. The covenant is not a mere undertaking to sell certain securities and that a sale would be accomplished by a certain time, netting a certain amount, in which event an allegation of breach that this certain amount had not been paid would not follow or be governed by the covenant. Brown v. Stebbins, 4 Hill, 154. The covenant, as I take it, is that on or before a certain date the plaintiff should receive a certain sum of money, and the assigned breach is that that date has passed and the money has not been paid. I am of the opinion that the complaint states a cause of action.

The first defense is that the agreement or contract sued on was *ultra vires;* that the defendant, a domestic corporation, organized under the Banking Law, being chapter 37 of the General Laws, had no right or power to enter into the contract set out in the complaint and that any acts done or benefits claimed by the plaintiff are ineffectual and not binding on the defendant.

To this defense the plaintiff demurs for insufficiency. I am of the opinion that the demurrer is well taken. The cautiously pleaded contract does not, so far as disclosed,

Digitized by Google

appear to be illegal, immoral or against public policy, and though it be *ultra vires* in the strict sense of that term, that is to say beyond the enumerated or reasonably implied powers of the corporation, the latter is estopped from pleading the defense because the contract has been fully executed by the plaintiff. Whatever may be the rule in other jurisdictions, it must be taken as settled in this State through a long line of decisions from Bissell v. M. S. & N. I. R. R. Co's., 22 N. Y. 258, to Vought v. Eastern Building & Loan Assn. of Syracuse, 172 id. 508, that "while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced, yet when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power." 172 N. Y. 518.

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract." Whitney Arms Co. v. Barlow, 63 N. Y. 62, 70.

The contract which the plaintiff has pleaded he certainly has fully executed. What the defendant sought to obtain under the contract it has secured. Whether or not it availed itself of its privilege is, on the facts, no concern of the plaintiff. The plaintiff performed. He placed the stocks and bonds at the entire disposal of the defendant; he exercised no acts of ownership; he was ready to turn them over to the defendant on demand pursuant to his contract. He deprived himself of any opportunity to make other disposition of his holdings during the term. Even though the securities still remain in his hands as a result of the defendant's default, yet nevertheless the *contract* in relation to these securities has been as fully executed by the plaintiff as it was in his power to do.

Being fully executed, it becomes immaterial whether the contract was *ultra vires* or not under the authorities cited, unless in addition to being *ultra vires,* it was either *mala in*

Digitized by Google

sc, mala prohibita or against declared public policy. It needs no argument to show that it was not *mala in se;* the contract involves no moral turpitude. Nor does the contract as pleaded violate public policy. It cannot be said to be a wagering contract which a corporation having banking or trust company powers should not be permitted in law to make. Is it *mala prohibita?* It is not *mala prohibita* in the sense now under discussion under section 10 of the General Corporation Law which declares that "no corporation shall possess or exercise any corporate powers not given by law." That is a mere general provision relating to *ultra vires* in its restricted — and correct — sense, violations of which may give the State a right to proceed against the corporation, or the stockholders and corporators the right to restrain the application of corporate funds to foreign purposes. It has no bearing on a suit brought by a private individual on an executed contract. But "a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed." Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 30, 31. Is the contract *mala prohibita* in this sense? The defendant invokes section 159 of the Banking Law, *supra,* which provides as follows: "The capital of every such corporation shall be invested in bonds and mortgages on unencumbered real property in this State, worth at least double the amount loaned thereon, or in the stocks or bonds of this State or of the United States, or of any county or incorporated city of this State duly authorized by law to be issued. The moneys received by any such corporation in trust may be invested in its discretion in the securities of the same kind in which its capital is required to be invested, or in the stocks or bonds of any State of the United States, or in such real or personal securities as it may deem proper. *No such corporation shall hold stock in any private corporation to an amount in excess of ten per cent of the capital of the corporation holding such stock.*" The italicized portion is

Digitized by Google

the part of the statute particularly invoked by the defendant. I do not think this section makes the contract *mala prohibita* in the sense now under discussion. Its violation may give the same rights as violations under section 10 of the General Corporation Law, *supra,* but I do not take it to be that specific prohibition which renders a contract, executory or executed, unenforceable. See Taylor Priv. Corp. (5th ed.), § 301.

But beyond this I am inclined to agree with the argument of the counsel for the plaintiff that nothing in the contract shows that the securities were intended by the parties to constitute part of the capital of the defendant, or that the defendant was intending, or that the plaintiff knew it was intending, to invest any *trust* funds in the stock of the United States Shipbuilding Company. Further it nowhere appears what the capital of the defendant is, or what the plaintiff knew about it. On the pleaded facts I am unable to say that the contract was in violation of any such specific statutory prohibition under the authorities, or that the plaintiff was properly chargeable with the knowledge of any such specific vice or defect in the contract. The demurrer to this defense should be sustained.

The second defense which pleads lack of authority in those who engaged to execute the contract in question on behalf of the defendant is not attacked.

The third and fourth defenses, to each of which demurrers are interposed, may be conveniently considered together.

The gist of these defenses is that the defendant denies that the plaintiff was the lawful owner of the securities set out in the complaint by averring that they were fraudulently received by him and that he did not have and could not make a marketable title.

Substantially these facts are set forth: The plaintiff was a director and a large or controlling stockholder in a Delaware corporation, the Harlan and Hollingsworth Company, and had full knowledge of its business, its contracts, its physical and financial condition. The entire stock and property of this company were sold to the United States Shipbuilding Company for a consideration consisting partly of

Digitized by Google

cash and partly of securities of the shipbuilding company. The amount of cash and securities received by the plaintiff is set out and it is then alleged that the plaintiff induced the payment of the cash and the issuance of the securities by false or fraudulent representations made or authorized by him to be made to the shipbuilding company. The alleged fraudulent representations are then set forth in detail and it is thereupon averred that the securities "were fraudulently received by the plaintiff and he did not have and could not make a good or marketable title thereto."

The fourth separate defense alleges in addition that when the sale of the capital stock and property of the Harlan and Hollingsworth Company was made to the shipbuilding company, it was covenanted by the plaintiff that the former company should be free from debt, except current liabilities, and that its property should be free of liens except a certain stated amount which was to be paid out of surplus earnings. It is alleged that when the sale was consummated the company was not free from debt, that the stated liens had not been paid out of surplus earnings, there being none, and that by reason of the failure of the plaintiff to keep his covenants he did not have and could not make a good and marketable title to the securities he placed at the disposal of the defendant.

It is difficult to see how the matter pleaded in either of these defenses is sufficient in law. So far as the sale of the Harlan and Hollingsworth stock and property was concerned, no contract relation existed between the plaintiff and the defendant. So far as alleged in these defenses no false representations were made to it; no covenants were entered into with it.

The defenses necessarily rest solely on the allegations that by reason of the premises the plaintiff's title to the securities set forth in the complaint was fraudulent, unmarketable and not good. But this is a mere conclusion of law and on the facts pleaded constitutes no defense. The plaintiff's stocks, whether obtained fraudulently or not, were marketable. His title may have been a defeasible title, that is the shipbuilding company might have rescinded; but until that had been

Digitized by Google

done the plaintiff's title was good so far as the defendant was concerned. His title to the securities was not void but merely voidable at the election of the shipbuilding company. The defendant fails to show title in a third person or ouster during the period that it was called upon to perform its contract, or that it has been compelled to pay the true owner the value of the securities. The defenses rest solely on a contingent defeasibility of title which has not become actual. Under the authorities the matter pleaded does not constitute a defense (McGiffin v. Baird, 62 N. Y. 329; O'Brien v. Jones, 91 id. 193; Akin v. Meeker, 78 Hun, 387) and each of the demurrers must be sustained.

The fifth separate defense, repeating the allegations of the two previous defenses, alleges that when the contract in suit was executed the plaintiff represented that the preferred and common stocks of the shipbuilding company were full paid and nonassessable, when in fact and to his knowledge, on account of the misrepresentations and unkept covenants set forth in the prior defenses, the stocks were liable to further assessments in the hands of the holders. Waiving the defect in the plea of the false representations (Lefler v. Field, 52 N. Y. 621), I am of the opinion that it does not appear that the representation was false. The allegation that the stock is not full paid is not made as an allegation of fact but as a conclusion of law, deducible from the facts set out in the third and fourth defenses. It is averred that the stocks were not full paid and that the holder "was liable for further assessments * * * by reason of the allegations in the foregoing Third and Fourth defenses of the defendant." Obviously if there is nothing in these defenses to show the representation false, *i. e.*, that the stocks were not full paid, the fifth defense is bad. The third and fourth defenses state that the United States Shipbuilding Company is a New Jersey corporation but nowhere is the New Jersey statute set forth under which the stocks in question would be declared to be not fully paid and, therefore, assessable. Whether or not the stocks are subject to further assessment is determinable by the laws of the domicile of the corporation. These laws do not appear. On the trial an offer of proof of

Digitized by Google

the laws would be properly met by the objection that they had not been pleaded and the proof would, in the absence of amendment, have to be excluded. The point being now raised on demurrer must be held equally good. I am, therefore, of the opinion that this demurrer should be likewise sustained.

I come now to the counterclaim. Here the defendant alleges that the plaintiff was a large or controlling stockholder and a director in the Harlan and Hollingsworth Company, with full knowledge of its business, property and financial condition. On June 17, 1902, the plaintiff, with the other stockholders of the Harlan and Hollingsworth Company, entered into an agreement "to sell to one Lewis Nixon or to one John W. Young or to some other person or to some firm or corporation" all the property and capital stock of the Harlan and Hollingsworth Company for the consideration of $800,000 cash, $500,000 of the bonds, and $400,000 each of the preferred and common stocks of the United States Shipbuilding Company, the intention being to convey all the said property and capital stock to the United States Shipbuilding Company. Pursuant to that agreement, the property and capital stock of the Harlan and Hollingsworth Company were conveyed and assigned to the United States Shipbuilding Company, and the consideration paid to the stockholders of the Harlan and Hollingsworth Company, of which consideration the plaintiff received in cash $384,000 and $240,000 of the bonds, and $191,600 each of the preferred and common stocks of the United States Shipbuilding Company. "*In order to secure the payment of said sum of eight hundred thousand dollars to the stockholders of the Harlan and Hollingsworth Company, the plaintiff made or authorized, or caused to be made to the defendant false representations*" as to the Harlan and Hollingsworth Company, being the same representations as are recited in the third separate defense. These representations were known by the plaintiff to be false, and made with intent to influence the defendant. The defendant believing them to be true and relying thereon "and for the purpose of assisting the said Lewis Nixon or John W. Young and the said

Digitized by Google

United States Shipbuilding Company to carry out the agreement * * * paid to the plaintiff" and the other stockholders of the Harlan and Hollingsworth Company "the sum of eight hundred thousand dollars * * * which said sum * * * by reason of the false representations of the plaintiff hereinbefore recited *has been wholly lost to the defendant.*"

The plaintiff claims that the counterclaim fails to state a cause of action and that even if it does, it is not within section 501 of the Code of Civil Procedure. While I am of the opinion that the latter objection is unsound (Siebrecht v. Siegel-Cooper Co., 38 App. Div. 549; Rothschild v. Mack, 115 N. Y. 1), I must hold that in its present form the counterclaim fails to state a cause of action. Reduced to lowest terms the defendant alleges a consummated contract between the plaintiff and others and Nixon or others, by which the Harlan and Hollingsworth properties were to be sold. In order to induce the defendant to advance the cash part of the consideration for the plaintiff's contract with Nixon or others, the plaintiff made false representations to the defendant which, relying thereon, paid out the cash to assist Nixon, or the others, with the result that the money was "wholly lost."

The vice here is that it does not appear how the money was wholly lost. The plaintiff made no contract with the defendant. The latter's claim is purely for a tort. Being an action for tort — for deceit to be more specific — there must be facts from which the reasonable inference is deducible that the $800,000 was wholly lost to the defendant. Nothing in the facts shows this loss. The defendant may have ample security from Nixon or the others. The contract which is made to assist Nixon or the others may be still in force. The mere fact that advances were made to a third party on the plaintiff's false representations does not *per se* establish loss in any amount to the defendant. What was the undertaking of the third party in return for the advances made to him? Did he not obligate himself to make repayment to the defendant? If he did, has the debt matured, or has the security proved inadequate? What is

Digitized by Google

there on the face of the answer to show loss except the statement of a legal conclusion? A different question would be presented had there been a contract relation between the parties to this suit. But the defendant's cause of action sounds solely in tort. While it may waive the tort and sue in assumpsit so as to make this a pleadable counterclaim, yet the foundation of its action against the plaintiff remains the deceit, and so far as that cause of action is concerned, the defendant fails to show by proper facts that it has sustained damage or injury.

I am, therefore, of the opinion that each demurrer is well taken, and that each should be sustained. Leave will be given to plead over on payment of costs.

Demurrers sustained, leave to plead over on payment of costs.

CHARLES JAMES PHALEN, Plaintiff, *v.* THE UNITED STATES TRUST CO., as Trustee, Etc., et al., Defendants.

(Supreme Court, New York Special Term, June 1904.)

Action by a son to compel specific performance of a testator's covenant, made with his son in an ante-nuptial agreement relative to his marriage, that he would make no distinction between his children in disposing of his estate by will — Breach, by a codicil having the effect of giving the other children an advantage — Demurrer to complaint — Parties — Jurisdiction of the surrogate in regard to a will — Res adjudicata.

The complaint in an action for specific performance alleged that a testator, then having a wife, a son, the plaintiff herein, and two daughters, covenanted, in an ante-nuptial agreement made in 1873 four days prior to the plaintiff's marriage, by the parties thereto, the father of his fiancee, and the testator and his wife, that he and his wife would make no distinction between their children in disposing of their estates, that the testator made a will, in 1882, giving his residuary estate to the defendant, in trust, to pay his widow and each child the income of one-quarter of the corpus for life, with power to the defendant to pay over to each child, as his or her absolute property any part of the capital that he or she might, by an instrument in writing duly proved and acknowledged, require, except the sum of $50,000 which the defendant was required to hold during the life of each child for his or her benefit, that upon the death of a child the capital of its share,

Digitized by Google

then held by the trustee, should be paid to the child's appointees by will, or failing that, to children, or, failing both, to the testator's next of kin, that the testator also directed, as to the plaintiff's quarter share, that upon his death his wife should be paid so much of its principal as would secure her the one-fourth of the estate to which she would be entitled under the ante-nuptial agreement, that the share of the widow, since deceased, of the testator, was, upon her death, to be divided among the children and had been entirely distributed. That, in 1887, the testator made a codicil to his will by which he directed the defendant to hold the plaintiff's share, except a dwelling in Paris occupied by him, for his life, pay him the income for life and at his death divide the principal among his heirs, that, in 1890, the executors of the will accounted before the surrogate, paid over the shares to the defendant and were discharged, that the defendant had paid over to the daughters parts of their shares, that the defendant has refused and refuses to pay the plaintiff any of the principal of his share, which, in 1890, was $168,184.82, and the plaintiff demanded as relief payment to him of that amount, less the $50,000, and also abrogation of the trust created by the codicil in question. The plaintiff has no children and his sisters defendant would be his only heirs should he die now. The defendant demurred to the complaint for insufficiency and also on the ground that the executors were necessary parties.

Held, that the complaint stated a cause of action.

That, as to the plaintiff's share, the codicil was violative of the ante-nuptial agreement and void.

That the executors were not necessary parties, because the plaintiff never had a cause of action against them.

That the decree made by the surrogate was not *res adjudicata* as to the plaintiff, although he and his wife were parties to the proceedings, for the surrogate had no jurisdiction to pass upon an independent contract made between the plaintiff and the testator.

ACTION for a specific performance of a contract. Demurrer to complaint.

Frederick S. Woodruff, for plaintiff.

Edward W. Sheldon, for defendant trust company.

SCOTT, J. This action was begun in February, 1904, for a specific performance of a contract made with the plaintiff by his father, James Phalen, and for other relief. The material allegations in the complaint may be summarized as follows:

James Phalen, formerly of New York, died in Paris,

Digitized by Google

France, January 20, 1887, leaving a will and seven codicils, which were thereafter proved in the New York county Surrogate's Court and letters testamentary thereon issued to Edgar Lockwood and Florence, Comtesse de Gabriac, the two executors therein named. The testator left him surviving his widow, Catherine S. Phalen, who has since died, and three children, the defendants, Florence, Comtesse de Gabriac and Catherine, Comtesse de Narbonne-Lara, and the plaintiff, Charles James Phalen, his only heirs and next of kin. On August 7, 1873, in contemplation of the plaintiff's marriage with one Julia de Zakrevsky, a written contract under seal was entered into at Baden-Baden, between the intending parties to such marriage, the father of Miss de Zakrevsky and the father and mother of the plaintiff, by which, after various stipulations between the other parties, Mr. and Mrs. Phalen the elder respectively covenanted and agreed on their part that they would make no distinction between their children as regarded the proportion of their estates coming to each child under their respective wills. Relying upon this covenant the plaintiff was married to Miss de Zakrevsky, August 11, 1873. On May 15, 1882, Mr. James Phalen made a will, by the ninth clause of which, among other things, he gave all his residuary estate to the defendant trust company in trust to divide into four equal parts, to hold one of those parts for the benefit of his widow during her life, and upon her death to transfer the principal of such one-fourth absolutely to the testator's children; to hold one other fourth part for the benefit of each of the three children, and to pay over to such beneficiary as her or his absolute property any part of the capital that she or he might, by an instrument in writing duly proved or acknowledged, require (saving the sum of $70,000, which amount at least was to remain in trust for the benefit of the child during her or his lifetime), and to pay to each child for life the income from the trust fund or from so much thereof as remained in the trustee's hands. Upon the death of the child the capital of the fund then held by the trustee was to be transferred and paid as the child so dying might appoint by will, or in default of appointment, to her or his

Digitized by Google

children, or failing both appointment and issue, to the testator's next of kin. With respect to the plaintiff's quarter share, it was specified that so much of the principal was, on his death, to be paid to his wife Julia as was necessary to secure her the one-fourth part of his estate, to which she would be entitled under the marriage contract. In the tenth clause the testator provided that "it is further my intention and desire that all the stipulations by which I am bound in the marriage contracts of my children shall be fully and faithfully executed, anything in this will contained (if any such thing there be) to the contrary notwithstanding." Six codicils to this will were thereafter made, dated respectively, August 12, 1882, October 25, 1883, January 24, 1885, May 26, 1886, November 5, 1886, and December 31, 1886, which altered the foregoing provision for his three children to the extent only of reducing the minimum sum which should remain in trust for each child from $70,000 to $50,000 in St. Louis, Iron Mountain and Southern Railway Company general mortgage five per cent. bonds. The provision thus made for the plaintiff conformed to the terms of his marriage contract and to the testator's obligations thereunder. But on January 17, 1887, three days before his death, the testator made the seventh and last codicil to his will, which is alleged to be in conflict with the above recited stipulation in the marriage contract of his son. This codicil contained two clauses; by the first the testator gave the portion and property of the estate which by his will he had left to the plaintiff, to the defendant trust company in trust, to pay the income to or for the use and support of his son for life, and at his death, to divide the principal among his heirs-at-law, except that the dwelling-house occupied by the son in Paris should go to the son absolutely. The second clause of the codicil contained several small legacies to servants.

After the probate of the will the executors administered the estate, and by a decree of the Surrogate's Court, entered July 29, 1890, their accounts were judicially settled; the amount of the residuary estate and of the four shares thereof was determined, and the executors were directed to turn over such shares to the defendant trust company as trustee of

Digitized by Google

the various trusts created by the will. The plaintiff, his wife and all other persons interested in the estate were parties to this accounting proceeding. The shares decreed to be held in the trust for the plaintiff consisted of railway bonds and cash of the value of $168,184.82. By reason of the seventh codicil the plaintiff's rights under the marriage contract were violated to his damage in the exact amount of the difference between the value of the trust fund now held by the trustee and the $50,000 of St. Louis, Iron Mountain and Southern Railway bonds. The executors complied with all the terms of this decree; there is no further property of the estate in their hands and they are discharged from all further liability. Mrs. Phalen, the testator's widow, has died, and her estate has been entirely distributed. The defendant trust company has, on the request of the testator's daughters, paid over to them parts of the principal of their shares of the residuary estate, but still holds the whole of the principal of the fund for the benefit of the plaintiff. The plaintiff has demanded of the defendant trust company that it turn over to him all of the principal of his share except the $50,000 mentioned in the fifth codicil, but this demand has been refused. The plaintiff has no children, and his sisters, the individual defendants, would be his only heirs-at-law if he should die now.

Judgment is, therefore, prayed that the trust created by the seventh codicil be declared to be in violation of the plaintiff's rights under his marriage contract; that the plaintiff is entitled to the principal of the trust fund, after reserving the $50,000 in bonds therefrom; that the trust under the seventh codicil be abrogated; that the remainders given thereby be extinguished; that it be declared that the defendant trust company holds the trust fund under the original will, as modified by the first six codicils, and be directed to turn over all of the fund, except $50,000 in bonds, to the plaintiff, and to continue to hold such $50,000 in accordance with the trusts declared in the ninth clause of the original will.

The defendant trustee has demurred to the complaint on two grounds: (1) That the complaint did not state facts

Digitized by Google

sufficient to constitute a cause of action, and (2) that to any action for damages for breach of contract Edgar Lockwood and Florence, Comtesse de Gabriac, the executors of the will of James Phalen, deceased, were necessary parties defendant.

The case of Colby v. Colby, 81 Hun, 221, seems to be an authority for the maintenance of an action of this character. In order to enforce the agreement of James Phalen, incorporated into the marriage settlement, it is necessary that the seventh codicil to his will should be declared to be ineffective. An appeal to the equity side of the court is necessary because the purpose of the action is to direct a trustee in the administration of the trust estate, a purpose which is peculiarly one of equitable cognizance. The decree in the accounting proceeding is not *res adjudicata* of the plaintiff's rights because his claim to be paid a part of the sum now held in trust for him was not within the jurisdiction of the surrogate. The plaintiff's right, if he has one, to withdraw a part of the trust fund from the hands of the trustee is not to be found in the will, which the surrogate has power to construe for the purpose of making distribution, but upon an independent contract between the decedent and the plaintiff, upon the validity and effect of which the surrogate has no power to pass. His power and duty were exhausted when he found that the will and codicils were properly executed, and that under them the trustee was entitled to receive the funds set apart for plaintiff's benefit. If there had been a question arising on the will and codicils themselves as to the trustee's right to receive the fund, or as to the terms upon which it would be held, the surrogate's decree might be decisive, but the question as to the power of the testator, owing to an obligation *dehors* the will, to make a particular testamentary disposition of his property could not have been raised before the surrogate, and, if attempted to be raised, could not have been passed upon. The plaintiff was not a creditor of the estate in the hands of the executors. The antenuptial agreement gave him no status as a creditor upon the accounting. Whatever right he has affects the duty of the trustee, not the duties of the executors. In any event the trustee was en-

Digitized by Google

titled to receive the share of plaintiff and his sisters from the executors. It was the trustee and not the executors who were under the ninth clause of the will, upon demand, to pay over a part of the principal. The plaintiff could not have asked the executors to pay over any part of the principal to him, and they could not have complied with any such request. Their sole and whole duty was performed when the fund had been paid over to the trustee. Whatever right plaintiff has to receive a part of the principal is a right to receive it from the trustee. The plaintiff, therefore, has not, and never has had, a cause of action against the executors, and they are not necessary parties defendant. I cannot escape the conclusion that the seventh codicil of the will was violative of the agreement contained in the eighth article of the antenuptial contract. The clear meaning of that agreement was that in disposing of his estate by will the testator would observe equality among his children. He need not have given any of them anything, but so far as he gave anything he bound himself to make no distinction between his children. True, it was to be an equality of proportion, but also an equality of the proportion coming to them. In a narrow sense nothing comes to either of them, so far as concerns the principal, except so much as they are permitted to withdraw from the trust, but I am not disposed to rest my decision upon that narrow construction. I prefer to stand upon the broader, and, as I think, safer ground, that the testator's agreement was to treat all of his children alike. If the seventh codicil be enforced, it is clear that all are not treated alike. My conclusion, therefore, is that the seventh codicil, so far as it affects the plaintiff's share of the estate, is violative of the antenuptial contract, and is, therefore, void.

Demurrer overruled, with costs, with leave to defendant to to withdraw demurrer and answer within twenty days upon payment of costs.

Demurrer overruled, with costs, with leave to defendant to withdraw and answer within twenty days upon payment of costs.

Digitized by Google

ADELE BALDWIN, Administratrix, and WILLIAM OGDEN HARRISON, Administrator with the Will Annexed of ELIZABETH B. RICE, Deceased, Plaintiffs, *v.* WILLIAM M. RICE, Jr., JOHN D. BARTINE and JAMES A. BAKER, Jr., Executors, Etc., of WILLIAM M. RICE, Deceased, Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Surrogate's Court — Jurisdiction — Collateral attack — Code Civ. Pro., §§ 2642, 2643, 2695, 2697 — Foreign wills — Domiciliary and ancillary administration and conflict of laws — Distinction between record and probate of foreign will — Essentials of jurisdiction to issue letters in New York State on a foreign will, admitted to probate in the testator's domicile — Judgments — Res adjudicata — Collateral attack — Adjudication between foreign representatives of two decedents when a bar to an action on the same subject matter between domestic representatives of the same decedents — Act of Congress, March 11, 1902, creating the Southern District of Texas and transferring pending causes in the Eastern District thereto — A cause, in which one party has died, was thereby transferred as pending action.

The Surrogate's Court, although now a constitutional court, is still one whose jurisdiction is defined by statute and persons claiming under its decree must be prepared to show its jurisdiction when that is disputed; its lack of jurisdiction may be set up as a defense in an action where the validity of its decree is an essential element of recovery.

There is a marked distinction between wills admitted to probate in the State of New York and wills filed or recorded in this State upon an exemplification of the record of probate in another State; the surrogate's jurisdiction to issue letters in the latter class is limited to the issue of ancillary letters testamentary or ancillary letters of administration with the will annexed.

The surrogate has no authority to issue ancillary letters upon a will, admitted to record or filed in his court upon an exemplified record of its probate in another State, except to a person named in the foreign letters to administer the estate or to a person otherwise entitled to the possession of the personal property of decedent, unless the consent of such foreign representative, or person otherwise entitled, to the appointment of another person applying for letters, is filed with the petition therefor.

Where a surrogate issues such letters to other persons without such consent and the recipients of such letters sue in the Supreme

Digitized by Google

Court, their capacity to sue can be questioned on the ground of the invalidity of their letters by reason of their failure to file such consent with the petition for their appointment.

The authority of a surrogate to decree that an executor be deemed to have renounced is limited to wills admitted to probate in his court, and does not extend to an executor named in a will which has been admitted to probate in another State and is merely filed or recorded in his office upon an exemplification of the foreign probate.

No one can take out administration in this State, after a foreign probate, except by or through the consent of the foreign executor.

A judgment of a court of the United States, sitting in equity, adjudicating between the executor of a decedent, to whom letters testamentary were issued in the domicile of his testatrix, and the local administrator of another decedent, and adjudging that there is no validity in a claim asserted by the said executor against the said administrator by reason of an alleged debt, alleged to have been owing by the latter decedent during his lifetime to the said executor as assets of the estate of his testatrix, is a bar to any action in another jurisdiction, brought by persons claiming to be administrators with the will annexed of the said testatrix, against the domiciliary representatives of the alleged debtor, in the latter jurisdiction.

The validity of the judgment which is above stated to be a bar, cannot be assailed, by the administrators with the will annexed, on the ground that it was entered by consent, or pursuant to an agreement of compromise and settlement of the first action.

The practice in the State of New York does not permit an attack upon a former judgment entered by consent, or pursuant to compromise, and adjudicating the same question between privies, pleaded in bar, where it is apparent that the court which entered the decree had jurisdiction of the parties and the subject matter, obtained without fraud, and no fraud was practiced upon the court, or by either of the parties to the suit upon the other, in the entry of the decree.

The Act of Congress of March 11, 1902, creating the Southern District of Texas, transferred, from the Eastern District, pending actions and provided that those causes should be retained, in the Eastern District, in which evidence had been taken "before the present District Judges of the Judicial Districts of Texas as heretofore constituted."

Held, that an action, to which the sole party plaintiff had died, was a *pending* action within the meaning of the law, was transferred thereby and might be revived in the new district by the

Digitized by Google

administrator of the deceased plaintiff, and that a decree, entered after such reviver, in the new district, was within the jurisdiction of the court.

That, although testimony had been taken in the cause, by deposition and before special examiners, prior to the creation of the new district, such evidence had not been taken before the judge, within the meaning of the proviso, and that the cause was, therefore, not retained in the Eastern District but was transferred to the Southern District by the operation of the law.

This was an action, by persons suing as administrators with the will annexed of a deceased testatrix (a wife), to recover a sum of money, from the executors of a deceased testator (her husband), which they asserted the right to recover as the proceeds of property alleged by the plaintiffs to have been held by the husband and wife as community property under the laws of Texas. The plaintiffs claimed under an appointment of the Surrogate's Court of New York county, and alleged that the defendants, who had received letters testamentary from the Surrogate's Court of New York county, had assets of their testator, which originated in community property of the husband and wife, and that such assets were, to the extent of the wife's interest in the community property in which they originated, unadministered assets of the deceased wife's estate in New York county, and were, therefore, applicable to the payment of the claim asserted by the plaintiffs as representatives of the deceased wife. The husband and wife were married in Texas. The plaintiffs showed that under the laws of Texas the subsequent acquisitions of either spouse (with certain exceptions) were community property, owned in equal undivided portions by husband and wife, and that each spouse on dying could dispose by will of his or her share of the community property. Mrs. Rice died before her husband, leaving a will by which she bequeathed a very large amount in legacies. Her will was admitted to probate in Houston, Texas, and Oran T. Holt, the executor named in her will as *independent executor,* under the laws of Texas, received letters testamentary from the County Court of Harris county, a court of probate in Texas. He promptly brought suit against William M. Rice, the husband of his testatrix, to recover assets of the estate

Digitized by Google

alleged to exist, as community property, in the hands of her husband. This suit was brought in a State court, and was removed to a Federal court on the ground of diversity of citizenship, and was pending at the time of the death of William M. Rice. Two other similar suits were brought against alienees of Rice. These three are the suits in which judgments were obtained that are incidentally mentioned in the opinion as "the other judgments read in evidence." William M. Rice defended the suit brought against him by Holt, and instituted an action against Holt, in the United States Court for the Eastern District of Texas, to test the validity of the claim asserted by Holt and to declare it void, and to remove it as a cloud upon Rice's title to property in Texas. Rice denied the validity of the executor's contention, on the ground that, though married in Texas, he was not a citizen of Texas at the time, and never became a citizen of Texas thereafter, and that the community laws of Texas did not apply to his property. In each of the Texas suits testimony was taken by deposition and also by special examiners of the court and was returned to the clerk's office of the court. Before any of the suits in Texas came to trial, Wm. M. Rice, the husband, died in New York city. Rice's will was propounded for probate in New York county, and was contested. See Matter of Will of Rice, 81 App. Div. 223; 176 N. Y. 570. Pending the contest in New York over his will, letters of temporary administration were granted upon his estate in Texas, and his will, not having been probated in Texas, permanent letters of administration were granted upon his estate to Horace B. Rice by the County Court of Harris county, Texas. Horace B. Rice, the administrator in Texas, having received authority from the court of his appointment, entered into an agreement of compromise and settlement with Oran T. Holt, executor of Mrs. Rice, wherein, among other things, it was agreed that upon payment of a sum agreed to be received in satisfaction of all claims and demands asserted by Holt, and disputed and denied by Wm. M. Rice in his lifetime, the suits embodying the dispute between Holt and Wm. M. Rice should proceed to decree adjudicating against Holt. Meanwhile, Congress

Digitized by Google

had created the Southern District of Texas (Act 1902, March eleventh) and had transferred thereto all cases pending in the Eastern District of which the Southern District would now have territorial cognizance, providing, however, for the retention in the Eastern District, of all pending causes in which the testimony or any part of it had been already taken before a judge. The causes involving the dispute between Holt and Rice were revived by Rice's Texas administrator and proceeded to judgment and decree pursuant to the agreement of settlement and compromise, adjudging the invalidity of the claim asserted by Holt. One of those suits was within the territorial cognizance of the Southern District of Texas, was deemed by Holt and Rice, administrator, to have been transferred thereto from the Eastern District, by the terms of the act of Congress, notwithstanding testimony had been taken therein by deposition and before special examiners, and the action was revived in the Southern District and proceeded to a decree therein. Certain of the legatees of Elizabeth B. Rice were residents of New York; they deemed themselves aggrieved by the action of Mr. Holt and one of them, Adele Baldwin, petitioned the Surrogate's Court of New York county, upon an exemplified record of the probate proceedings upon Mrs. Rice's will in Texas, for the recording of the same in the said surrogate's office, and the issue of letters with the will annexed thereon to the petitioner, joining Wm. Ogden Harrison with her as coadministrator. The surrogate admitted the exemplified will and proofs to be filed in his office, and issued a citation, and order to show cause, directed to Oran T. Holt, directing him to qualify as executor in New York or show cause why he should not be deemed to have renounced. The citation and order were served on Holt personally in Texas, pursuant to an order of publication or personal service outside of the State. On the return day, as Holt failed to appear, the surrogate made a decree that he be deemed to have renounced, and issued letters of administration, with the will annexed, to the present plaintiffs. The contest over the will of Wm. M. Rice in New York having ended with a judgment by the Court of Appeals affirming a decree of the surrogate of New

Digitized by Google

York county admitting it to probate, the present defendants, named as executors in his will, received letters testamentary in New York. The plaintiffs sued the defendants to obtain a judgment, subjecting New York assets of Wm. M. Rice to the claim of plaintiffs as administrators, with the will annexed of his deceased wife, for the purpose of paying New York legatees of his deceased wife, who had not accepted the settlement effected by her Texas executor. The defendants interposed numerous defenses; among them: that the appointment of the plaintiffs was void, and that the surrogate made it without jurisdiction or authority; that the plaintiffs were without capacity to sue and that the judgments between the Texas executor of Mrs. Rice and the Texas administrator of Mr. Rice were *res adjudicata* between the present parties, and a bar to this action. Upon the trial, when the judgment between Rice and Holt, the decree of the Southern District of Texas, was offered in evidence in behalf of defendants, it was objected to, among other grounds, on the ground that the court was without jurisdiction, because the action was instituted before the creation of the Southern District, was pending in the Eastern District when Wm. M. Rice died, abated upon his death, and was, therefore, not a *pending* action, transferred to the Southern District by the act creating the Southern District; and, further, because it was an action which, if deemed pending within the terms of the act, still was retained in the Eastern District by virtue of that provision of the law which retained causes in which evidence had been taken before a judge.

In the course of the trial, it became apparent that, if the plaintiffs were without the capacity which they alleged, or if any of the judgments pleaded and offered in evidence as a bar to the action were actually a bar, the trial of all other issues was wholly unnecessary. Consequently after the close of the plaintiffs' case, the judge heard arguments on these propositions, and having determined them all in favor of the defendants he announced the following opinion:

Arthur B. Turnure (Jared F. Harrison and John Brooks Leavitt, of counsel), for plaintiffs.

Digitized by Google

Hornblower, Byrne, Miller & Potter (John M. Bowers, James Byrne and Charles A. Boston, of counsel), for defendants.

SCOTT, J. After further consideration of the provisions of the Code of Civil Procedure and a careful reading of the authorities cited upon the opposing briefs, I find myself confirmed in the opinion, expressed upon the trial, that the Code is intended to preserve and does consistently preserve a marked distinction between wills admitted to probate in this State and those which are permitted to be filed or recorded upon the production of an exemplified record of probate in a foreign State. Upon wills of the latter class the surrogate's power is limited to the issue of ancillary letters testamentary, or ancillary letters of administration with the will annexed. § 2695. The sections so confidently relied upon by plaintiffs (§§ 2642, 2643) apply by their very terms to the case of a renunciation or refusal to qualify of an executor named in a will which has been admitted to probate. The will of Elizabeth B. Rice has not been admitted to probate in this State. The plaintiff's petition asked that it be recorded in the surrogate's office, and the decree of the surrogate merely directed that "the will of the said Elizabeth B. Rice, with the proofs and decree adjudging probate thereof be filed in the office of the surrogate of the county of New York." It matters not that neither in the surrogate's decree nor in the letters of administration are the plaintiffs described as ancillary administrators. They could not have been appointed other than ancillary administrators under such proceedings as were had in respect to this will. But while the filing of the foreign will with the authenticated record of its probate in Texas conferred upon the surrogate authority to issue ancillary letters, he had no authority to issue such letters, or any letters to these plaintiffs. Section 2697 of the Code limits the issue of such letters to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent "unless another person applies therefor, and files with his petition an instrument executed by the foreign executor or adminis-

Digitized by Google

trator or person otherwise entitled as aforesaid, authorizing the petitioner to receive such ancillary letters." The plaintiffs did not bring themselves within the terms of this section, and hence their attempted appointment by the surrogate was void. As was remarked in Montgomery v. Boyd, 70 App. Div. 64–71, with respect to a nonresident decedent leaving assets in this State, "no one can take out administration here except through, or by the voluntary action of the foreign executor." The defendants have the right to call in question in this action the validity of plaintiffs' appointment and their resultant capacity to maintain this action. The Surrogate's Court, while it is now a constitutional court so far as concerns its existence, possesses only such jurisdiction as is conferred upon it by statute, and only such powers as are either expressly conferred upon it or are necessarily incident to the exercise of its statutory jurisdiction. Bevan v. Cooper, 72 N. Y. 327; Riggs v. Cragg, 89 id. 479; Matter of Bolton, 159 id. 134. Therefore, any one claiming title or authority under a decree of a Surrogate's Court must be prepared to show that the court had jurisdiction to make the decree (Matter of Hawley, 104 N. Y. 262), and such a decree may always be attacked collaterally for lack of jurisdiction in the surrogate (Taylor v. Syme, 162 id. 519). My conclusion is that the attempted appointment of plaintiffs as administrators with the will annexed of Elizabeth B. Rice, deceased, was void, and that they thereby acquired no capacity to maintain this action. I am also of the opinion that, even if the plaintiffs had been lawfully appointed and had capacity to sue, the judgment of the Circuit Court of the United States in the action in which William M. Rice was originally plaintiff and Oran T. Holt as executor, etc., of Elizabeth B. Rice, deceased, was defendant, would stand as a complete and impregnable bar to any recovery in this action. It is not important to consider the objections offered to the other judgments read in evidence, for it must be, and I understand is, conceded that the action to which I have referred involved the identical issues raised in this action, and that the judgment in that action, if valid and unimpeachable, constitutes a complete bar to a recovery in the present action. The

Digitized by Google

plaintiffs seek to call in question that judgment in this action, upon the ground that it was entered upon the consent of Holt, the executor in Texas of Mrs. Rice's will; that he had no legal authority to give such consent; that it was given in pursuance of a collusive agreement between him and the personal representatives of William M. Rice, then deceased, which provided for a totally inadequate payment to Mrs. Rice's legatees; that the plaintiff Baldwin and certain other legatees have protested against the agreement and refused to consent thereto or to take anything thereunder. It is not contended that the Circuit Court had not jurisdiction to entertain the action, or that any fraud was committed in invoking that jurisdiction, or that any fraud was committed upon Holt to induce him to consent to a compromise of the action and the entry of a judgment therein. The only fraud charged is that Holt, as executor of Mrs. Rice's will, committed a fraud upon her legatees. I know of no principle upon which the judgment can be collaterally attacked in this action upon any of the grounds suggested. The plaintiffs seek to maintain this action in a representative capacity as administrators with the will annexed of Elizabeth B. Rice, deceased, and their claim to act in that capacity is based upon the refusal of Holt, the Texas executor, to take out ancillary letters in this State. They stand, therefore, so far as this action is concerned, in Holt's shoes, and can have no greater rights than he would have had if he had taken out letters here. It seems to be self-evident that he could not, for any of the reasons suggested by plaintiffs, have called into question the judgment of the Federal court. It is well settled, by an unbroken line of decisions, that a judgment may be impeached, even collaterally, for a fraud practiced in the procurement or concoction of the judgment itself by which the defendant was prevented from availing himself of his defense (Mayor v. Brady, 115 N. Y. 599), but an examination of the cases holding that doctrine will show that the fraud referred to is one practiced upon the defendant in the judgment. There is no contention that any such fraud was practiced upon Holt in the case under consideration. It is also undoubtedly true that a collusive judgment may be questioned collaterally by parties who are injured by it, or

Digitized by Google

against whom it is invoked as a bar, if they were neither parties to it, nor privies. Spicer v. Waters, 65 Barb. 227; 2 Cowen & Hill's Notes, 854 *et seq.* That rule might be invoked by Mr. Rice's legatees, if they were in a position to sue in their own behalf, but it is not available to these plaintiffs suing in a representative capacity, and merely as the substitutes in this State, of Holt, the executor by whose consent the judgment was entered. The objection that the action was not properly transferred to the Circuit Court for the Southern District of Texas is untenable. The act of Congress of March 11, 1902, creating the Southern District provided for the transfer of "pending" actions and proceedings. At that date, owing to the death of Wm. M. Rice, his action against Holt had abated. It was not, however, terminated, and was still pending. An action upon a cause which survives the death of a party is not ended by his death. It still remains pending, but is dormant, subject to be revived at any time by the substitution of the proper representative or successor in interest of the deceased party. Nor was the action excepted from the provision of the statute because an order had been made for the taking of testimony before examiners in equity. The proviso was that those causes should be retained in the court in which they originated, in which "evidence had been taken in whole or in part before the present District Judges of the judicial districts of Texas as heretofore constituted." Under the equity practice of the Federal courts evidence taken before an examiner, in preparation for the submission of the cause to the court, cannot in any proper sense be said to have been taken before a judge. The evident intention of the proviso was that causes should not be transferred which had been partly tried before one of the judges. Such was not this case. For the reason that the judgment referred to is a bar to this action, not impeachable upon any ground stated in the reply, as well as for the reason that the plaintiffs have no legal capacity to maintain the action there must be judgment dismissing the complaint upon the merits, with costs, but under the circumstances without an allowance.

Complaint dismissed, with costs.

Digitized by Google

ADELE BALDWIN et al., Plaintiffs, *v.* WILLIAM M. RICE, JR., et al., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Costs — Persons, who sue in a representative capacity only and whose lack of capacity is adjudged in the suit, will be charged with costs personally.

Where persons sue in a representative capacity, as administratrix and administrator with the will annexed of a testatrix, and their capacity is denied and it is adjudged in the action that their appointment was void and consequently that they are without the representative capacity which they allege, they must be charged with costs personally.

THE nature of the action is stated in 44 Misc. Rep. 64.

Jared F. Harrison, for plaintiffs.

Charles A. Boston, for defendants.

SCOTT, J. This is certainly a case wherein costs should be awarded. The very questions sought to be raised by plaintiffs had already been determined adversely with the interests they claim to represent in another State. If costs are awarded, it must be against the plaintiffs personally, for it is found by the decree that they were never administrators. The decision and decree have been settled accordingly.

Ordered accordingly.

THE SOUTHOLD SAVINGS BANK, Plaintiff, *v.* THE BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 22 OF THE TOWN OF HEMPSTEAD, Defendant.

(Supreme Court, Suffolk Special Term, June, 1904.)

Parties — When the court should not direct a third party to be brought into an action.

A controversy, existing between the city of New York and a school district which had issued certain bonds before a part of the district was incorporated into the city by the charter of 1897,

Digitized by Google

as to what part of the indebtedness is chargeable upon each municipality, affords no reason for the court to direct the city to be made a party to an action, brought by a bank, a holder of the bonds, against the board of the district, to recover interest on the bonds due and unpaid because of the controversy, and this because the school district should adjust its dispute with the city without making the plaintiff a party to the litigation or delaying the present action.

MOTION by the defendant for an order directing that the city of New York be made a party defendant to this action, and directing the plaintiff to issue supplemental summons and to cause the same to be served upon the city of New York when so made a party.

This is an action to recover various sums due the plaintiff for interest on certain bonds issued by the defendant. Subsequent to the issue of the bonds, by the passage of the Greater New York Charter, a portion of the school district as it had existed at the time when the bonds were issued was cut off and became a part of the city of New York. No adjustment of the bonded indebtedness of the district having been made between the city and the district, interest was not paid on the bonds and this action was brought.

Wyckoff, Statesir & Frost (Edward L. Frost, of counsel), for motion.

Herbert L. Fordham, opposed.

SMITH, J. In my opinion, the defendant should adjust its affairs with the city of New York without making the plaintiff a party to the litigation. I think the court if it had the power should not delay the plaintiff in the collection of its just dues by compelling it to await the determination of a controversy for the origin of which plaintiff was not at all responsible.

Motion denied.

Digitized by Google

Matter of the Estate of Louis T. Hoyt, Deceased.

(Surrogate's Court, New York County, June, 1904.)

Transfer tax — On life and remainder interests left in trust payable out of capital — Federal tax similarly payable — Interest chargeable against a trustee.

Under the amendments to section 230 of the Tax Law made in 1899 and 1900 the transfer taxes on life interests and remainder interests, in a fund left in trust, are equally payable forthwith out of the capital and this although the remainders are contingent.

The Federal taxes under the War Revenue Law of 1898 are similarly payable out of capital.

Where securities have not been actually set apart to constitute a particular trust, but the trustee pays the life beneficiary thereof interest on the amount at the same rate as that actually earned by the whole assets of the testator in the hands of the trustee, he cannot be charged with any higher rate of interest.

Objections to the account of an executor.

Edward W. Sheldon, for executor.

Carter & Ledyard, for A. Woodfield.

William E. Ver Planck, for Julia MacKinnon.

Howard Townsend and Richards & Heald, for Julia McD. Sabine.

Thomas, S. Under the law as it existed prior to the amendments made to section 230 of the Tax Law by Laws of 1899, chapter 76, the executor is clearly right in his contention that the tax to be imposed on the beneficiaries of the life estates was required to be paid from income (Matter of Hoyt, 37 Misc. Rep. 720; Matter of Tracy, 87 App. Div. 215; Matter of Johnson, 6 Dem. 146). Under that law the beneficiaries of the life estate were also entitled to the income on the full amount of the trust fund, and the tax imposed on remainder interests, even though vested, was required to be paid by the transferees of the remainders, or raised by sale of such remainders, and could not be de-

Digitized by Google

ducted from the fund to which such remaindermen had no present title (Matter of Hoyt, 37 Misc. Rep. 720; Estate of Beal Cockey, Ransom, S., 1893; Matter of McMahon, 28 Misc. Rep. 697). Under that law, if applied to the trust estates created by the will of the testator, no tax on remainders could now be imposed at all, since each and every of the estates in remainder are contingent, and the persons who will eventually become entitled to beneficial enjoyment are not now ascertainable.

Section 230 of the Tax Law, as amended in 1899 and 1900, contained the following provision: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be payable forthwith by the executors or trustees out of the property transferred."

By this amendment the Legislature clearly "intended to change the law upon the subject and to make the transfer tax, upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for by the provisions of the statute, it is to be paid 'out of the property transferred.' So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust" (Matter of Vanderbilt, 172 N. Y. 69, 72). "Each trust estate created is to be separately appraised and the tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate; and when fixed, the tax is forthwith payable out of the trust estate" (172 N. Y. 73).

This statute applies to the trusts created by the will of the relator. The tax on each interest in the trust is to be computed, and the aggregate of the taxes due as to each trust is then to be paid out of the capital of the trust. The life beneficiary's interest is one of the trust interests the tax on

Digitized by Google

which is so to be paid out of capital. This is precisely what was done in the Vanderbilt case. The same scheme was attempted by an amendment made in 1897 to the same section, but which applied only "when property is devised or bequeathed in trust for persons in succession who are all liable to taxation at the same rate." In such cases absolute equity is done as between the life beneficiaries and remaindermen. The hardship to the life beneficiary which is involved if the remaindermen are taxable at 5 per cent., while the life interest is only taxable at 1 per cent., is pointed out and deplored in Matter of Brez (172 N. Y. 609). The further hardship upon a life beneficiary in requiring her to pay out of her first income the full tax in advance, upon moneys which she may not live to obtain is now pointed out, and this will be avoided by the construction placed upon the statute in the Vanderbilt case.

The tax under the Federal War Revenue Law of 1898 is imposed upon "any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares," etc. The tax is made a "lien or charge upon the property of every person who may die," etc., and the "executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to any beneficial interest therein, shall pay" such tax. The payment must, therefore, be paid from capital. In adjusting the rights of the parties in interest, as between each other, the rules of our State law have been applied to the Federal tax, for the reason that these rules are based on equitable principles (Matter of Tracy, 87 App. Div. 215; Matter of Hoyt, 37 Misc. Rep. 720). We should, therefore, apply to trust estates the rules laid down for trust estates under our present statute, and all Federal transfer taxes on such trust estates should be paid out of capital.

The objections to the payments out of income for transfer taxes under the State and Federal laws are sustained.

The objection to the rate of income on the $300,000 trust fixed by the executor in its account must be overruled. This trust has not been set up by appropriating any particular securities. The average rate of income received by the ex-

Digitized by Google

ecutor on all of the assets of the testator in its hands has been computed, and payments to the life beneficiary have been made at that rate. No negligence on the part of the executor is alleged which would justify me in imposing a charge on it in excess of income received by it. No principle will permit me to cut down the income of others entitled to shares in the estate. The amount of this trust cannot be treated as a money legacy payable with legal interest. The rule adopted was an equitable one (Monson v. New York Security & Trust Co., 140 N. Y. 498; Duclos v. Benner, 136 id. 560).

Decreed accordingly.

Matter of the Estate of FREDERICKA BENDER, Deceased.

(Surrogate's Court, New York County, June, 1904.)

Trust — "Lawful children" — When "children" is equivalent to "descendants."

A testatrix, after creating a trust in real estate to pay the income equally to her five children for life, during the lives of two of them, Louisa and Henry, with remainder in one-fifth of the corpus to the heirs of each, directed that if a child died during the trust his or her share of the income should pass to his or her surviving "lawful children". Henry died after the testatrix and left a child Christina, who also died and left children.

Held, that the grandchildren of Henry were entitled during the trust to one-fifth of the income.

That, treating the word "children" in its primary sense, Christina, on Henry's death, became owner of one-fifth of the net income for the residue of the trust period, which income on her death passed to her children as her heirs and that after her death, if the gift of income was limited to her life, the share of income, not being disposed of by the will, passed to the persons presumptively entitled to the next eventual estate, her children, who are the heirs of Henry and as such entitled to one-fifth of the corpus at the end of the term.

That the testatrix did not intend to die intestate as to any part of her estate and also intended that the descendants of Henry should stand in his place during and at the end of the trust term and that, if necessary to effectuate this intention, the word "children" should be read as meaning "descendants."

Digitized by Google

PROCEEDINGS upon the judicial settlement of the accounts of a trustee. Objections to accounts.

Joseph F. Stier, for trustee.

Robert L. Wensley, for guardian.

H. Aplington, for contestants.

THOMAS, S. The trust created by the testatrix was limited as to its continuance to the lives of Louisa Deffaa and Henry Bender, two of her five children. So long as they, or either of them, lived, the trustees were to "divide and pay over" the residue of the rents after the payment of certain specified charges and expenses, to her five children, of whom Henry was one. Henry died August 13, 1899, leaving a daughter, Christina Buhler, him surviving. The sentence in the trust provision of the will then applicable was: "In case either of my said children shall die during the continuance of this trust, then I give his or her share of the net income of my estate to his or her lawful children, him or her surviving." Treating the word "children" in its primary sense Christina Buhler became, on the death of her father, Henry Bender, the owner of one-fifth of the net income of the trust property, to have and to hold the same for the residue of the trust period, since no other limitation is placed on her right of enjoyment, and on her death this interest passed to her children as her heirs-at-law, the entire trust property being real estate. Still treating the word "children" in its primary sense, and reading into the will an intent not expressed, to limit the gift of income to the child of Henry Bender for her life only, the share of Henry Bender in the trust income, for the period after the death of his daughter until the expiration of the trust term, is undisposed of by the will. If this is so, such income belongs to the persons presumptively entitled to the next eventual estate (Real Property Law, § 53; 1 Rev. Stat. 726, § 40). These persons are the children of Christina Buhler, who are the heirs of Henry Bender and are, as such, by

Digitized by Google

the terms of the will, to take one-fifth of the corpus of the trust property at the end of the trust term. The intention of the testatrix was to make a complete disposition of her estate, and not to be intestate as to any part of it; she also intended that the descendants of her son Henry should stand in his place and take his interest in her estate, both during and at the end of the trust term. If necessary to effectuate this intention the word "children" should be read as meaning "descendants." Each of these lines of reasoning will lead to the same result, and will give to the infant grandchildren of Henry Bender the right to one-fifth of the income. In an accounting for income, since the death of Mrs. Buhler, a decree was made, without objection, affirming this right. Without resting this decision on the binding character of that decree on the precise issue now raised, I will follow the principle on which it rests, and will overrule the objection to the items of payment to the Buhler infants, contained in the account.

The will contains an express direction for the payment of commissions and expenses for collecting rents, and the objections to the items of payment for that purpose are overruled.

Decreed accordingly.

HARRY C. RAYNES, Plaintiff, *v.* SAMUEL BLOOM, Defendant.

(County Court, Kings County, June, 1904.)

County Court of Kings county — Jurisdiction of an action to recover of a non-resident of the county a sum of money only, removed by the defendant to the County Court from a Municipal Court of the city of New York.

The County Court of Kings county has jurisdiction of an action brought in the Municipal Court of the city of New York in the borough of Brooklyn against a non-resident of Kings county to recover a sum of money only and removed by the defendant under the Municipal Court Act to the County Court — in a case where the Municipal Court had jurisdiction of the subject matter and of the defendant — not because the removal estops the defendant from raising the question of the jurisdiction of the County Court

Digitized by Google

in such a case, but because Code Civ. Pro., § 2439, as amended in 1893, had the effect of giving the County Court of Kings county jurisdiction over actions removed to it from district and justices' courts — of which the Municipal Courts are a continuance and have jurisdiction in cases where district and justices' courts had formerly had it — even if the action was for a sum of money only and the defendant a non-resident of the county, and this jurisdiction was expressly preserved to the County Court of Kings county by section 14 of article VI of the State Constitution providing that "County Courts shall have the powers and jurisdiction they now possess".

ACTION to recover brokerage commission. Motion for a new trial.

F. P. Hummel and Jacob Levy, for plaintiff.

Einstein, Townsend & Guiterman, for defendant.

CRANE, J. This action was brought in the Municipal Court in the borough of Brooklyn to recover the sum of $500 brokerage commission, and upon the application of the defendant under the Municipal Court Act an order was made removing the case into this court.

Upon the trial it appeared that the cause of action arose in the borough of Manhattan, and it affirmatively appeared and is beyond dispute that the defendant resided in the borough of Manhattan and never within the county of Kings.

By the answer in the County Court and upon the trial the objection was raised that the County Court had no jurisdiction because the defendant was a nonresident of the county, and a verdict having been rendered for the plaintiff the defendant moves for a new trial on this ground.

It is claimed by the plaintiff that the want of jurisdiction has been waived by the removal of the case into the County Court by the defendant and that as the Municipal Court had jurisdiction in the first instance, so has this court. It is insisted that the case of Vogel v. Banks, 60 App. Div. 459, has settled this question and that this court should be bound by that decision.

If this court has not jurisdiction over *the cause of action* the defect cannot be waived by any act of the parties, nor

Digitized by Google

can jurisdiction be conferred by their consent, and although it is stated in the Vogel case that the removal from the Municipal Court into the County Court estops the defendant from raising the question of the jurisdiction of the County Court, with all due respect I do not think waiver or estoppel to be the correct ground for that decision for the reasons stated in my opinion in the case of Perlman v. Gunn, 41 Misc. Rep. 166. If the County Court has not jurisdiction of the *cause of action* it can never be conferred by consent, waiver or any act of the parties. There is a distinction between jurisdiction of the person and jurisdiction of the cause of action. The County Court never had jurisdiction of a *cause of action* to recover money only, where the defendant was a nonresident of the county.

The earliest constitutional provision in reference to County Courts is found in article VI, section 14, of the Constitution of 1846, reading as follows: "The county court shall have jurisdiction, in cases arising in justice's courts, and in special cases as the legislature may prescribe and shall have no original civil jurisdiction except in such special cases." By this provision it was left to the Legislature to prescribe the County Court's jurisdiction, and thereafter and on the 12th of May, 1847, an act was passed known as "The Judiciary Act," (chap. 280), which prescribed and limited the powers of the County Court in actions for money only, to cases where the defendant resided within the county. Residence within the county where the action was brought to recover a sum of money only was required in the Civil Codes (Code of 1851, tit. 4, § 30; Voorhees' N. Y. Code [4th ed.], 1855, tit. 4, § 30) and these early provisions of the Judiciary Act have remained, with some changes and modifications, down to the present day. See Code Civ. Pro., 1904, § 340.

The Constitution of 1846 having given the County Court original civil jurisdiction in such special cases as the Legislature should prescribe, and the Legislature having restricted jurisdiction over actions to recover a sum of money only to cases where the defendant resided in the county, such were the powers and limitations of the County Court in this particular when the Constitution of 1846 was amended in

Digitized by Google

1869–1870. By that amendment article VI, referring to the County Court, read: "The county courts shall have the powers and jurisdiction they now possess, until altered by the legislature. They shall also have *original* jurisdiction in all cases where the defendant resides in the county in which the damages claimed shall not exceed one thousand dollars, and also such appellate jurisdiction as shall be provided by law, subject however to such provisions as shall be made by law for the removal of cases into the supreme court. They shall also have such original jurisdiction as shall from time to time be conferred upon them by the legislature." This was held in the case of Buckhout v. Rall, 28 Hun, 484, to be a constitutional limitation upon the jurisdiction of the County Court so that even the Legislature could not enlarge it to a claim for more than $1,000, and the statute of 1880, chapter 480, extending the court's jurisdiction to $3,000 was declared unconstitutional. If the Legislature could not thus extend the powers of the court, it likewise could not give jurisdiction over a cause of action for money only, where the defendant was a nonresident of the county, and if the Legislature could not do it because the court was created by constitutional provision to try *certain cases only,* how could consent, waiver or act of the parties or even estoppel confer jurisdiction upon it, in a prohibited case?

The Constitution of 1894 somewhat modified article VI of the previous Constitution by expressly providing that the Legislature could not extend the jurisdiction of the County Court so as to authorize an action therein for the recovery of money only, in which the sum demanded exceeded $2,000 or in which any person not a resident of the county was a defendant.

According to the provisions governing the County Court as above stated and for the reasons contained in my decision in the case of Perlman v. Gunn, *supra,* and the cases therein cited, I am convinced that the County Court never had original jurisdiction over a *cause of action* for a sum of money only, where the defendant was not a resident of the county; and not having jurisdiction of the cause of action,

Digitized by Google

the acts, consent or waiver of any or all the parties or estoppel could not confer such jurisdiction. See also Parkhurst v. Rochester Mach. Co., 65 Hun, 489.

There must be some other and further reason for the decision in the Vogel case than the opinion states to give the County Court jurisdiction over a cause of action removed to it from a Municipal Court, where that action is for a sum of money and the defendant a nonresident of the county.

Both the Constitution of 1846, amended in 1869, and that of 1894 preserved to the County Courts "All the powers and jurisdiction they now possess" while the limitations as to amount and residence applied to "Original jurisdiction."

Now, what were the powers and jurisdiction the County Courts possessed prior to 1869? As above stated the County Court at that time and at no time during its existence had original jurisdiction over an action to recover money where the defendant was a nonresident, but the Constitution of 1846 provided that the County Court should have such jurisdiction as the Legislature might prescribe, in two instances; first, in cases arising in justices' courts; second, over special cases.

The Legislature by early enactments gave to the County Court certain jurisdiction over cases arising in justices' courts. It provided in the laws of 1851, and as found in Voorhees' Code of 1855, §§ 351–371, for review by appeal to the County Court of the justice's decision. Later section 352 was amended in 1862, by providing that on appeal, where the amount claimed exceeded fifty dollars, *a new trial* could be had in the County Court, and this has remained the law till the present day (Code Civ. Pro., § 3068) and was the law in Kings county till 1893, when by chapter 380 of the laws of that year, section 2934 of the Code was amended to read as follows: "Where an issue of fact or an issue of law is joined in a justice's court, or before a justice of the peace in the city of Brooklyn, or in any of the towns in the *county of Kings,* in which the judgment demanded by either party in his pleadings exceeds the sum of one hundred dollars * * * the defendant may, after issue joined * * * apply to the justice before whom the action is brought for an

Digitized by Google

order removing the action into the county court of the county of Kings * * * From the time of the granting of the order the county court of Kings county has cognizance of the action, and the same shall be tried and determined by said county court as if originally brought therein."

Strange as it may seem, this is the reading of section 2934 of the Code to-day, although we have not had a justice of the peace or a justice's court in Brooklyn, nor in any towns in Kings county since consolidation in 1897, and although the first Greater New York Charter provided for Municipal Courts and removal from them into the County *or Supreme Court.*

However, when the Constitution of 1846 was amended in 1869, the County Courts had jurisdiction upon appeal to try cases originally brought in the justices' courts. What cases could be brought in the justice's court and could a nonresident of the county be sued therein?

By 2 Revised Statutes (p. 225, art. I, 1829), the justices' courts were given certain jurisdiction over cases to recover money, and it was provided that such actions must be brought in the town where either the plaintiff resided, or the defendant resided, or if plaintiff and defendant both be *nonresidents of the county,* then such action may be brought before any justice of the town in which the plaintiff or defendant may be. Thus the justices' courts in certain cases to recover money had jurisdiction over nonresidents. Worthington v. London G. & A. Co., 164 N. Y. 84.

Upon appeal and a demand for a new trial in such a case the County Court assumed or had jurisdiction to try a case for the recovery of money only, in which the defendant was a nonresident of the county and this was its jurisdiction preserved by the amended Constitution of 1869, and still remains outside of New York city. Article VI, section 15, of the amended Constitution of 1846 reads: "The county courts shall have the powers and jurisdiction they now possess *until altered by the legislature.*" The Legislature accordingly, in 1893, proceeded to alter the jurisdiction and powers the County Court had in cases on appeal from the justices' courts in Kings county by doing away with the

Digitized by Google

two trials in certain cases and permitting removal from the justice's court into the County Court. Thus instead of having the first trial in the justice's court and then upon appeal a new trial in the County Court, removal, upon application, was permitted so that the first and only trial would be in the County Court. Laws of 1893, chap. 380; Code Civ. Pro., § 2934.

This was according to and not in contravention of the Constitution of 1846 as amended. The County Court, therefore, upon such removal from the justice's court could and might have jurisdiction to try a case brought to recover a sum of money only where the defendant was a nonresident of the county, provided of course the justice's court had jurisdiction of the cause and the parties.

This act of 1893 did not confer upon the County Court in such cases "original" jurisdiction over nonresidents prohibited by the Constitution, as it was held, in the case of Cook v. Nellis, 18 N. Y. 126, that an action commenced in the justice's court where a claim of title was interposed and upon discontinuance recommenced in the County Court pursuant to statute was not "originally" brought in the County Court, but in the justice's court. See also Clyde & Rose Plank Road Co. v. Baker, 12 How. Pr. 371.

Thus we find that at the time of the adoption of the Constitution of 1894, the County Court of Kings county had jurisdiction over cases removed to it from the justices' courts even if the actions were for a *sum of money only, and the defendant a nonresident of the county* and this jurisdiction was expressly preserved by section 14, article VI of that Constitution. "County Courts shall have the powers and jurisdiction they now possess."

It was decided in the Worthington case above cited that the Municipal Courts of the greater city of New York were a continuance of the district courts of the old city of New York and of the justice's courts of Brooklyn and had jurisdiction of nonresidents in cases where the district and justices' courts had formerly had it. As the Municipal Court in this case had jurisdiction of the defendant, and of the cause, the County Court upon removal by the defendant

Digitized by Google

also had jurisdiction, not by *waiver* or *estoppel*, but because it always had such jurisdiction, or at least did have it since 1893 and prior to the Constitution of 1894 and such jurisdiction was preserved to it by that Constitution.

The provisions of the Municipal Court Act permitting removals to the County Court are similar to, although not the same, as section 2934 of the Code of Civil Procedure.

It follows that the defendant's motion for a new trial based upon the assertion that this court has not jurisdiction of the cause, because it affirmatively appears that he is a resident of Manhattan and not of Kings county, must be denied.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* LEWIS V. RATHBUN, ALONZO S. RATHBUN and MARY E. RATHBUN, Defendants.

(County Court, Madison County, June, 1904.)

Crimes — Sufficiency of an indictment for a conspiracy to defraud — Description of crime — Some additional overt act must be done and pleaded in furtherance of the object of the conspiracy — When an indictment does not charge more than one crime — Where the overt act, necessarily alleged, is not sufficiently alleged to charge a felony, the misdemeanor of conspiracy does not merge in the felony.

Conspiracy is an offense known to the common law and where an indictment specifically charges that crime the indictment is not demurrable under Code Crim. Pro., § 276, requiring an indictment to name the crime.

An indictment which alleges that the defendants, individually and as officers of both the companies hereinafter named, conspired to cheat and defraud the Rathbun-Sawyer Co. by drawing drafts and checks against it in their favor or in favor of some or all or each of them, and in favor of the Gulf Milling Co. representing indebtedness due from the said Rathbun-Sawyer Co., and procured the checks and drafts to be cashed, when, as the defendants knew, no such indebtedness existed and that thereby the Rathbun-Sawyer Co. was defrauded of $20,000, which the defendants appropriated to their own use or to the use of persons to the jury unknown, other than the true owners thereof, is sufficient, as the unlawful agreement is alleged as well as the doing

Digitized by Google

of an overt act in furtherance of, and to carry out, the agreement.

The indictment need not set out the checks and drafts.

It does not charge more than one crime merely because, after stating the crime, it alleges the acts done to effectuate the object of the conspiracy.

As the People are required by law to establish, not only the conspiracy, but also to charge and prove the commission, by one or more of the conspirators, of some overt act to effect the object of the conspiracy, the allegation, in the indictment, of the overt act that the defendants appropriated $20,000 — not sufficiently alleged in the indictment, as appears therefrom, to set forth the felony of grand larceny and procure a conviction for that crime — cannot be permitted to effect a merger of the conspiracy in the felony and thereby prevent a prosecution for the conspiracy.

DEMURRER to indictment.

M. H. Kiley, district attorney, for people.

Wayte & Bonsted, for defendants.

SMITH, J. The indictment accuses the defendants of the crime of conspiracy.

The defendants demur to the indictment on the following grounds:

First. The indictment does not describe the crime mentioned in the Penal Code sufficiently to identify the same.

Second. The facts stated in the indictment do not constitute a crime.

Third. The indictment does not conform substantially to the requirement of sections 275 and 276 of the Code of Criminal Procedure, in that the acts constituting the crime are not sufficiently set forth.

Fourth. The checks and drafts referred to on the face of the indictment are not sufficiently set forth and described; no overt act, pursuant to the conspiracy, is sufficiently alleged.

Fifth. That more than one crime is charged in the same count, to wit, conspiracy and grand larceny in the first degree.

Sixth. That the misdemeanor of conspiracy is merged in the offense of grand larceny.

Seventh. The name of the crime charged is inconsistent with, and not supported by, the facts stated in the indictment.

Digitized by Google

Section 276 of the Code of Criminal Procedure requires the indictment to name the crime with which the defendant is accused, if it have one, such as treason, murder, arson, manslaughter or the like, or if it be a misdemeanor having no general name, such as libel, assault or the like, insert a brief description of it as it is given by statute.

Conspiracy is an offense known to the common law. 2 Russ. Cr. 673, and cases there cited; 4 Black. Comm. 162. Before the adoption of the Penal Code, the Revised Statutes also made certain conspiracies of two or more persons a misdemeanor. 2 Rev. Stat. 962, § 8; 1 Wheel. Cr. Cas. 150–222. And section 168 of the Code defines the offense and provides what acts shall constitute it.

Therefore, I think the indictment sufficiently names the crime with which the defendants are accused. The indictment accuses them of an offense which has a name, and is well known and understood under our law, and at the commencement of the indictment the defendant is informed of the offense of which he is accused.

The indictment alleges that the defendants committed the crime of conspiracy as follows:

That they on the 1st day of January, 1900, at Oneida, Madison county, N. Y., and from that time continuously and down to the 1st day of March, 1903, did individually, and as officers of a domestic corporation, located at Oneida, to wit, The Rathbun-Sawyer Company, and individually, and as officers of a domestic corporation known as The Gulf Milling Company, knowingly, wickedly and intentionally conspire together to cheat and defraud the said Rathbun-Sawyer Company out of its money and property; and the said defendants so conspiring, by means of drawing and procuring to be cashed checks and drafts against the Rathbun-Sawyer Company, in favor of the said Gulf Milling Company, or in favor of the said Mary E. Rathbun, Lewis V. Rathbun and Alonzo S. Rathbun, some, or all, or each of them, which said checks so drawn as aforesaid by the said Lewis V. Rathbun, as president of the Rathbun-Sawyer Company, were intentionally, knowingly, and wrongfully represented and stated to be so drawn to pay an indebtedness of the Rathbun-Sawyer

Digitized by Google

Company to the said Gulf Milling Company or to the said defendant Mary E. Rathbun or to the said Lewis V. Rathbun, when in truth and in fact no such indebtedness existed against the said Rathbun-Sawyer Company, in favor of the said Gulf Milling Company, or in favor of either of the defendants, as the defendants well knew, thereby cheating and defrauding the said Rathbun-Sawyer Company and the stockholders thereof, out of $20,000, which the defendants appropriated to their own use, or to the use of persons to the jury unknown, other than the true owners thereof.

By section 168 of the Penal Code, if two or more persons conspire

"1. To commit a crime. * * *.

"4. To cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses; * * * Each of them is guilty of a misdemeanor."

By section 171 of the same Code, no agreement except to commit a felony upon the person of another, or to commit arson or burglary amounts to conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

It has been always held to be the law that the gist of the offense of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. But under our statutes a conspiracy, that is, the entering into the confederation merely, is not an indictable offense, except when the agreement by its terms is to commit a felony upon the person of another, or to commit arson or burglary, unless some overt act beside such agreement is done to effect the object thereof.

The indictment alleges that the defendants conspired to cheat and defraud the Rathbun-Sawyer Company, by drawing drafts and checks against said company, in favor of each of the defendants, and in favor of the Gulf Milling Company, representing indebtedness due from said Rathbun-Sawyer Company, and procuring such checks and drafts to be cashed, when, as the defendants knew, no such indebted-

Digitized by Google

ness existed. The indictment further alleges that the defendants drew such drafts and checks and procured them to be cashed. No further or other allegations were necessary to make the crime of conspiracy complete. The unlawful agreement being thus alleged, as well as the doing of some overt act in furtherance of, and to carry out such agreement, no further allegations were necessary. People v. Everest, 51 Hun, 19.

Another ground of demurrer is that the indictment does not conform to the requirements of sections 275 and 276 of the Code of Criminal Procedure, in that the acts constituting the crime are not sufficiently set forth. The suggestions before made apply to this question, and if the conclusions already reached are correct, no further suggestions in answer to this ground of demurrer are necessary.

I do not think it was necessary to set out in the indictment the checks and draft alleged to have been drawn in furtherance of the agreement or combination. As before stated, the offense of conspiracy, as defined by the statute, consists of a combination of two or more individuals to commit a crime, or to do some one of the other acts mentioned in section 168 of the Penal Code. One leading principle in the law relating to conspiracy is that the unlawful agreement constitutes the gist of the offense; and when the nature and object of the conspiracy are properly charged in the indictment, the other allegations should be limited to a statement of the means adopted by the accused to carry out the conspiracy, and the overt act committed by them to effect the purpose intended. It can hardly be said that the checks and drafts which the alleged conspirators intended or agreed to draw should be set out in the indictment; indeed, it would be impossible to state with any certainty just what checks and drafts they intended or agreed to draw, or to give a description of them in the indictment. It would be an offense for them to agree to draw the checks and drafts, with the intent and for the purpose alleged, and when they did any overt act in furtherance of that agreement, the crime would be complete. The overt act is stated to be the drawing of checks and drafts under that agreement or combination,

Digitized by Google

and procuring the money thereon. In other words, the nature and object of the combination, to wit, drawing checks and drafts on the Rathbun-Sawyer Company, to cheat and defraud that company, is explicitly, and I think properly, stated in the indictment, and the other necessary allegations, to wit, the drawing of the checks and drafts, should, or properly can be limited to a statement of the means adopted by the accused to carry out the conspiracy, a statement of the overt acts committed by them to effect the purpose intended. The indictment sets forth such means and overt act. It charges that the defendants drew checks and drafts and procured the money thereon, thus adding sufficient to make the combination, which as before seen is the gist of the offense, a complete crime under our statutes. Under these allegations the checks and drafts can be admitted as evidence in support of the allegations. People v. Mather, 4 Wend. 230, 264.

An indictment for conspiracy to cheat and defraud has been held sufficient without averring the means to be used. Schultz Case, 5 C. H. Rec. 112. But see also March v. People, 7 Barb. 391; People v. Willis, 14 N. Y. Crim. 414. I think this indictment sets forth the means intended to be used.

I do not think more than one crime is charged in the indictment. The crime charged is conspiracy, and what the defendants are alleged to have done is intended as a statement of the acts done by the defendants to effect the object of the conspiracy. People v. Everest, *supra*.

The question as to whether, under the allegations of the indictment, the offense of conspiracy is merged in the offense of grand larceny is, as I view it, the most serious question presented by the demurrer. It will be observed that the indictment does not sufficiently allege the crime of grand larceny. It is not a good indictment for that offense. The allegations that the defendants obtained the money on the checks and drafts and appropriated it to their use or to the use of persons to the jury unknown evidently were intended to make the offense of conspiracy complete, as required by section 171 of the Penal Code. Doubtless it was not neces-

Digitized by Google

sary to allege these facts. In other words, proper allegations of the combination to draw the checks and drafts and of the drawing of them for the purpose and with the intent stated would be sufficient allegation of the crime of conspiracy, under sections 168 and 171 of the Penal Code. It is well settled that a conspiracy to commit a misdemeanor is not merged in the misdemeanor, the result of the conspiracy when committed. In People v. Mather, 4 Wend. 265, Marcy, J., says: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy and the object of the conspiracy is fully accomplished." Under the law, at the time of that decision, it was the illegal agreement that constituted the crime; when that was concluded the crime was perfect, and the conspirators could be convicted if the crime was proved. It was not necessary to prove any overt act toward the accomplishment of the object of the conspiracy. It was not necessary that such act be performed. People v. Johnson, 10 N. Y. Crim. 531.

In People v. Petersen, 15 N. Y. Crim. 421, Rumsey, J., says: "Whatever may be the rule when it is made to appear that a felony has been committed in pursuance of an agreement between certain parties to do it, so that they have been guilty of a conspiracy before the felony is perpetrated, as to which we say nothing, it is quite clear that when the conspiracy is to commit a certain forbidden act, which may or may not be a crime, the fact that the parties engaged in the conspiracy happen, in the completion of it, to do some other act incidental to and not necessarily involved in it, but which renders them liable to a conviction for felony, does not operate as a merger of the crime of conspiring to commit the forbidden act in it. The only case in which one crime can be merged in another (if it can be merged then) is where the illegal agreement was to do the very thing which is finally done, and which, being finally done is another crime of a greater degree."

In Johnson v. State, 26 N. J. Law, 313, the Supreme Court held, on an indictment for conspiracy, that the defend-

Digitized by Google

ants might be convicted, although it appeared that they had accomplished the crime of committing perjury.

As before seen, under our statutes, to make the crime of conspiracy complete (except as is stated in section 171 of the Penal Code) some act beside the agreement must be done to effect the object thereof. The gist of the crime being the prohibited combination, is it possible that the crime of conspiracy is destroyed, because the conspirators actually accomplished the object for which the conspiracy was formed? Is the crime of conspiracy any less because the object was accomplished? The People must be prepared not only to establish the combination, they must also prove the doing by some one or more of the conspirators of some overt act to effect the object thereof. And in making such proof, if it should appear that the overt act resulted in carrying out or doing the crime for which the combination was formed, and that crime was a felony, does it follow that the defendants could not be convicted of the lesser offense of conspiracy? I think not; and especially where the indictment does not sufficiently allege the felony to warrant a conviction of that crime, and where it is apparent that the allegations on that subject were simply to make the crime of conspiracy complete. I have not overlooked the case of People v. McKane, 31 Abb. N. C. 176, nor the case of People v. Willis, 24 Misc. Rep. 537. In the former case, Justice Bartlett cites the case of Commonwealth v. Kingsbury, 5 Mass. 106, where the Supreme Court of Massachusetts held that a conspiracy to commit a felony which had actually been committed could not be punished as an offense distinct from the felony. That case also held that the same rule applied to an executed conspiracy to commit a misdemeanor. The latter doctrine has not only not received the sanction of the courts, but has been expressly disapproved in several cases. Judge Bartlett states that there is a tendency to abandon the strict technical rule of merger in England and in some of the States, and it appears to have been actually abandoned in Massachusetts. Commonwealth v. Walther, 109 Mass. 309. Judge Bartlett also refers to Elkin v. People, 28 N. Y. 177. It was not necessary for the court to decide in that case nor

Digitized by Google

did the court decide as to whether the rule of merger contended for ought to prevail or not, but the court held that as no felony was established by the proof no merger of the misdemeanor in it did or could take place. I think this case tends to support the conclusion which I have reached, that as the indictment does not sufficiently set forth the crime of grand larceny, and was not intended thus to do, that there could be no conviction of that offense, and hence there could be no merger. In the case of People v. Wicks, 11 App. Div. 545, Hardin, P. J., in writing the opinion of the court, refers to the case of People v. McKane, 143 N. Y. 455, with the remark that it seems to be an authority for saying that where there is a conspiracy to commit a crime and the crime committed is a felony, the conspiracy merges in the felony so as to prevent a prosecution for the conspiracy itself. In that case the court was not called upon to, and apparently did not attempt to, decide that question.

I am unable to find any case which, under the law as it now exists, and under the indictment here presented, I regard as an authority holding that there is a merger of the conspiracy in the felony. Indeed, the substance of the decision in case of the People v. Willis, 24 Misc. Rep. 537, above referred to, so far as it has any bearing upon the question being considered, I regard as an authority against the doctrine contended for by the defendants. It holds that an overt act is necessary to constitute the crime and misdemeanor of conspiracy; the indictment must allege one or more overt acts; and where several overt acts are charged, as steps taken by the accused in consummation of the conspiracy but none of the said acts is charged as, or amounts necessarily to, a felony, the indictment is not demurrable, as charging more than one crime.

Under the two sections referred to, defining conspiracy, and requiring proof of the overt act, I feel confident that the former holdings concerning merger should be restricted in their application. I very greatly doubt there being any merger in the higher crime, if the higher crime, the object of the conspiracy, was actually accomplished. The People might not be able to prove the higher crime so as to secure

Digitized by Google

a conviction, while they could prove the conspiracy to commit it, and some overt act tending to its commission, in which case, if the doctrine contended for by the defendants is to prevail, the accused, however guilty, might go unpunished. I do not think such a construction should be given to the sections under which the indictment in this case was found, nor such a rule upheld by the courts. But whatever the courts may say upon this question, when it shall be necessary to pass upon it, I feel constrained to hold that, so far as the question is presented by the indictment in this case, there is no merger, because the crime of grand larceny is not sufficiently alleged, and there could be no conviction of that crime under the indictment. The crime of grand larceny is not attempted to be set forth, and whatever there is tending to allege that offense are merely allegations of overt acts to make the crime of conspiracy, for which the indictment is found complete.

There are some defects, largely, if not wholly clerical, which probably can be amended, under section 293 of the Code of Criminal Procedure, without prejudice to the rights of the defendants.

An order overruling the demurrer may be prepared.

Demurrer overruled.

JACOB NESTLER, Plaintiff, *v.* THE GERMANIA FIRE INSURANCE CO., Defendant.

(City Court of New York, Trial Term, June, 1904.)

Fire insurance — Construction of New York standard (eighty per cent) average clause.

A fire insurance policy provided that, unless otherwise provided by agreement endorsed on or added to the policy, it should be void if the insured now has or hereafter procures any other insurance on the property covered in whole or in part by the policy, that the insurer should not be liable for a greater proportion of any loss than the amount fixed by the policy bore to the whole insurance on the property, and that the insurer should not be liable for any greater proportion of a loss than the sum hereby insured bears to eighty per cent of the actual cash value of the property

Digitized by Google

at the time of a loss. At the time of the issue of the policy, upon which the plaintiff brought this action, he had on the property covered by that policy other policies amounting to 175 per cent. of the actual cash value of the insured property, which fact he concealed from the insurer, and when it issued the policy in suit the property became insured for about 200 per cent. of its actual cash value. On the day after the policy in suit was issued the insured took out, without notice to the insurer, another policy which made the total insurance on the property amount to 230 per cent. of its actual cash value.

Held, that while the last above stated eighty per cent. clause impliedly authorized the insured to take out, without the written consent of the insurer, additional insurance up to eighty per cent. of the actual cash value of the property, that clause did not cover the insurance obtained by the insured before the policy in suit was issued as that insurance far exceeded eighty per cent. of the actual cash value of the property, and that the policy was thereby avoided.

That the policy taken out the day after the issue of the policy in suit, whereby the property became insured for 230 per cent. of its actual cash value, was in itself a distinct act of avoidance.

ACTION upon a policy of fire insurance. Tried before the court without a jury. The opinion states the facts.

Alfred Steckler, for plaintiff.

Ernest Hall, for defendant.

DELEHANTY, J. It is conceded herein that on June 11, 1902, the defendant issued its policy for $2,500 to plaintiff on his stock of goods contained in his store No. 2057 Third avenue, in the borough of Manhattan; that the actual sound value of the goods insured at the time of destruction thereof by fire was $10,344.60, and the aggregate insurance thereon at that time was $22,500; that on June 15, 1902, the insured goods were damaged by fire to the extent of $6,863.17, and defendant's proportionate share of same, if at all liable, is $762.58. The policy in question was of the standard form and contained among others the following provisions: (1) "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other

Digitized by Google

insurance, whether valid or not, on property covered in whole or in part by this policy." (2) "This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by an expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property," and (3) indorsed in red ink thereon, "New York Standard (80%) Average Clause With Exemption of Special Inventory or Appraisement in Certain Cases. This Company will not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bears to eighty per centum (80%) of the actual cash value of said property at the time such loss shall happen." It is admitted that other insurance was taken out by plaintiff both before and after the issuance of the policy in suit without the knowledge of defendant and the question to be determined is whether the clause last above mentioned impliedly permitted the same without further action upon the part of defendant under the clause first above set forth. If it did then it follows as a matter of course that there must be judgment for plaintiff; otherwise for defendant. Admittedly the decision of the question is a novel one in the insurance law of this State. My attention has been called to but one case in our courts which has any bearing upon the subject in question, and my investigations along the same lines have resulted in no better discovery. The case cited is Catoosa Springs Co. v. Linch, 18 Misc. Rep. 209, decided by the Appellate Term of this department in October, 1896. There the policy in suit permitted a total insurance of $8,000. It contained a clause that the underwriters should not be liable thereunder for a greater proportion of any loss on the described property or for any loss by an expense of removal from premises endangered by fire than the amount thereby insured shall bear to the whole insurance, and also another that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the insured then had or shall thereafter make or procure any other contract of insurance thereon.

Digitized by Google

On the binder permitting the other insurance above specified was the following: "It is a condition of this policy, if at the time of loss the assured shall hold any policy of this or any other company on the property hereby insured, subject to the conditions of coinsurance or average, this company's liability herein shall be limited thereby to the same extent as though such clause were contained in this policy." At the time of the loss in question the aggregate insurance thereon included a policy issued by the Jefferson Company of Wheeling, W. Va. This last named policy contained the eighty per cent. average clause and the court held that that clause by intrinsic adoption was part of the policy in suit, and under it the insured was required to keep the property insured to eighty per cent. of its actual value. And further, upon the authority of Pool v. Milwaukee Mechanics' Ins. Co., 91 Wisc. 530, that such clause impliedly authorized additional insurance, without incurring the risk of an avoidance of the policy under the provisions requiring written consent for other insurance, even though the amount exceeded the limit expressly stipulated, viz., $8,000, provided, however, it did not extend the amount of permissible insurance beyond the eighty per cent. valuation. While this case is an authority and binding to the extent stated, I do not consider it in point upon all the issues herein. As stated when the plaintiff at bar obtained the policy in suit, he had already on the property covered thereby policies aggregating in value $17,500, or one hundred and seventy-five per cent. of the actual value of the insured property. This situation admittedly was concealed from defendant, and when it issued its policy the property in question became insured for about two hundred per cent. of its actual value. Still desiring further protection in that line the plaintiff obtained the very next day after the issuance of the policy herein, and without notice to this defendant, other insurance to the amount of $1,000. I think by his acts he overreached himself and consequently the policy in suit was avoided. Giving to plaintiff the most favorable construction deducible from the eighty per cent. average clause in question the most that can be claimed is that it permitted other insurance for an amount which that sum bore to the

Digitized by Google

actual value of the property insured. In the Pool case, *supra,* it was said that while this eighty per cent. average clause does not expressly authorize additional insurance without the consent of the insurer, yet it does by necessary implication authorize the same and make it an object for the insured to take additional insurance until the eighty per cent. of the actual cash value of the property should be obtained. This interpretation of the clause in question is, in my opinion, a reasonable one, and under the cases cited I conclude that plaintiff had, under the eighty per cent. average clause contained in the policy herein, the implied right to take other insurance upon the property in question up to eighty per cent. of the actual value thereof. But does that clause cover the previous insurance herein? The policy declares that it shall be void "if the insured now has" other insurance. As stated, he did have other insurance when the policy in suit was issued. The eighty per cent. clause was an added one, and although literally its language points to prospective insurance under the rule that when the meaning of an instrument taken as a whole is doubtful, its several provisions should be construed favorably to the party to whom the undertaking is made, and most strongly against the party in whose interest the provisions are introduced, the words must be held to refer to and include insurance already existing, provided the aggregate amount thereof does not exceed the eighty per cent. limit specified. As the previous insurance far exceeded that amount, the policy, in my opinion, was, therefore, avoided thereby. I conclude further that the taking out by plaintiff of the $1,000 policy the day after the issuance of the one in suit, whereby the property in question became insured in all for two hundred and thirty per cent. of its actual value, was in itself a distinct and separate act of avoidance. If right in my conclusions it follows that there must be judgment for defendant dismissing the complaint, which is hereby directed. Plaintiff to have a stay of ten days after entry and service of judgment and thirty days additional time to make and serve a case on appeal.

Judgment accordingly.

Digitized by Google

SARAH E. KELLY, Plaintiff, *v.* THE HOME SAVINGS BANK OF THE CITY OF ALBANY, and FRANKLIN B. BEERS and HARVEY S. BEDELL, as Executors of the Last Will and Testament of KATE V. BEERS, Deceased, Defendants.

(Supreme Court, Albany Special Term, June, 1904.)

Gift — Ineffectual unless absolute — Delivery — Intent of donor that the donee should have the thing given, when ineffectual — When a joint tenancy, with right of survivorship, is not created.

A mother having a deposit in a savings bank, whose rules forbid payment except on presentation of the pass-book, and who had made a will giving her daughter all her bank deposits not exceeding $7,000, went with her daughter to one of the banks, a savings bank, told an officer thereof that she would like her account there arranged so that either she or her daughter could draw it and, if anything happened to herself her daughter could get the money without any further trouble. The officer advised the making out of a new book in the name of herself or her daughter or the survivor of them, and this was done. Later when her deposits had come to exceed $7,000, the mother by a codicil to her will revoked its gift to her daughter of the bank deposits and substituted therefor $7,000 in money. She retained the pass-book during her life and after her death her executors claimed this savings bank deposit as assets of her estate. There was no question but that the mother had intended her daughter to have this deposit after her own death.

Held, that there was no absolute gift of the deposit as there was no irrevocable renunciation by the mother of all her interest in or title to the deposit, she having retained until her death the pass-book, without which the deposit could not be drawn, and being able at all times to draw it without the aid, assistance or permission of her daughter.

That the intention of the mother that after her death her daughter should have the deposit did not entitle the latter to recover it, because as a testamentary disposition of property the same was invalid, and if the gift regarded the future it was invalid as a promise without consideration.

That there was no creation of a joint tenancy, with right of survivorship in the daughter, as the mother had at all times during her life retained control of the deposit, with opportunity to repent and change her purpose as to its disposition, and of this right she availed herself when she executed the codicil to her will nullifying its disposition of the bank deposits.

Digitized by Google

The action was begun by the plaintiff as one at law to recover of the defendant, the Home Savings Bank of Albany, the deposit in suit as a gift to her from Kate V. Beers, her mother, but subsequently the defendants, Franklin B. Beers and Harvey S. Bedell, executors of Kate V. Beers, were interpleaded as they claimed the deposit as belonging to her estate. Upon the trial the jury answered in the affirmative the question, submitted to them by the court, "Did Mrs. Beers intend to create a joint tenancy in herself and the plaintiff in the moneys deposited in the Home Savings Bank, the ownership of the whole to go to the one who survived?" About a year after Mrs. Beers had made a will giving the plaintiff all her deposits in any banks of the city of Albany, not to exceed $7,000, and before she made, at a time when they exceeded that sum, a codicil by which she revoked that bequest and gave the plaintiff $7,000 instead in money, she went with the plaintiff to the defendant, presented her pass-book and said to an officer of the defendant that she "would like that account arranged so that either she or her daughter could draw it, and if anything happened to her her daughter could get the money without any further trouble." The officer told her that "He would make out a new book in the name of herself or her daughter, or the survivor of them; that would arrange it as she wished." She then signed a check for the balance of the old book and deposited the check in a new book, made out in the name of "Kate V. Beers or Sarah E. Kelly, her daughter, or the survivor of them." Mrs. Beers kept the new book and it was found after her death in her secretary, to which she and her daughter had keys.

Countryman, Nellis & Dubois, for plaintiff.

Harris & Rudd and Milton H. Merwin, for defendants.

HERRICK, J. In Matter of O'Connell, 33 App. Div. 483, it was said by Follett, J., that "He who attempts to establish title to property through a gift *inter vivos* as against the es-

Digitized by Google

tate of a decedent takes upon himself a heavy burden which he must support by evidence of great probative force, which clearly establishes every element of a valid gift, viz.: that the decedent intended to divest himself of the title in favor of the donee and accompanied his intent by a delivery of the subject matter of the gift."

It has also been said that "The elements necessary to constitute a valid gift are well understood and are not the subject of dispute. There must be on the part of the donor an intent to give, and a delivery of the thing given, to or for the donee, in pursuance of such intent, and on the part of the donee, acceptance. The subject of the gift may be chattels, choses in action, or any form of personal property, and what constitutes a delivery may depend on the nature and situation of the thing given. The delivery may be symbolical or actual, that is, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. * * * But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a completed gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title." Beaver v. Beaver, 117 N. Y. 421, 428, 429.

"In order to render a gift valid, *causa mortis* or *inter vivos,* the gift must be delivered to the donee, or it must be placed in his power by delivery of the means of obtaining possession. Without delivery the transaction is not valid as an executed gift.

"An absolute gift requires a renunciation by the donor, and an acquisition by the donee of all interest in and title to the subject of the gift. A portion cannot be retained and the remainder disposed of." Curry v. Powers, 70 N. Y. 212.

In the case at bar there was no renunciation by the donor of all interest or title in the money. There was no symbolical delivery; the pass-book, without which the money

Digitized by Google

could not be drawn, was retained by her in her own possession.

She never divested herself of control over the money; she could draw any or all of it at any time without the aid, assistance or permission of the plaintiff.

As was said in De Puy v. Stevens, 37 App. Div. 289: "There must be an actual or symbolical delivery of the property donated accompanied by an intention on the part of the donor to divest himself of all title to or dominion over the same, the reason for this rule being, that until these essential conditions have been fulfilled there always remains the *locus pœnitentiæ*, that is, 'The opportunity for the giver to repent and change his purpose.'"

In this case there was an "opportunity for the giver to repent and change his (her) purpose." At most there is shown but an intent to give. The case does not show those "qualities of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act which changes the title." Beaver v. Beaver, 117 N. Y. 421–429.

The intention of her mother that the plaintiff should have the money after her death does not entitle the plaintiff to recover, because as a testamentary disposition of her property it is invalid; and because, "If the gift regards the future, it is but a promise without consideration and has no validity." Curry v. Powers, 70 N. Y. 212–215.

It is claimed, however, that if not a valid gift, *inter vivos*, a joint ownership with the right of survivorship was created by the acts of Mrs. Beers.

"Joint tenancy, whether in land or personalty, is not favored either in law or equity, and it will never be inferred where any other deduction can be fairly made. In consequence survivorship which is an incident to joint tenancy, is seldom presumed." De Puy v. Stevens, 37 App. Div. 289.

The cases of McElroy v. Albany Savings Bank, 8 App. Div. 46; McElroy v. National Savings Bank, id. 192; Matter of Meehan, 59 id. 156, were all cases where the deposit was made in the name of husband and wife, or husband or wife, and where it was held that on account of the relationship

Digitized by Google

existing between the parties that that was evidence of an intent to give the moneys to the wife in case she survived him.

In the McElroy cases it was held that it was not necessary to the validity of the gift, under the circumstances, that the wife should have possession of the pass-book during the lifetime of her husband; that because of the unity of husband and wife, the possession of the husband was the possession of the wife.

These cases, therefore, cannot be considered authorities in any cases except those of husband and wife.

The mere fact that the money was placed in the names of both does not create a joint ownership with the right of survivorship.

Whether a gift "*inter vivos*" of the entire property, or the creation of a joint ownership, it is in either case a gift of property; and to be a gift it must be a completed one, parting with control over the property, with no opportunity for repentance and recall.

The case of Young v. Young, 80 N. Y. 422, was a case where, upon the death of the intestate, bonds were found in two packages inclosed in an envelope, upon which were indorsed memoranda signed by him, each of which described the bonds inclosed by numbers, and stated that certain of them belonged to William H. Young and the others belonged to John N. Young. Then followed a statement of the indorsement, of which the following is a copy: "But the inst. to become due thereon is owned and reserved by me for so long as I shall live, at my death they belong absolutely and entirely to them and their heirs."

William H. Young and John N. Young were his sons. The controversy arose over the portion of them that were said to belong to William H. Young, and the court said: "The intention of Joseph Young, deceased, to give the bonds in controversy on this appeal to his son William H. Young, reserving to himself only the interest during his life-time, was so clearly manifested, that we have examined the case with a strong disposition to effectuate that intention and sustain the gift, if possible."

Digitized by Google

After discussing what is necessary to constitute a valid gift, the court said: "A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel, especially where, as in this case, the line of division between these interests is not ascertainable. * * *

"If therefore the donor retained the custody of the bonds for the purpose of collecting the accruing interest, or even if they were placed in the joint custody or possession of himself and the donee, there was no sufficient delivery to constitute a gift."

It has become very common, particularly for people advanced in years, to open accounts, or change accounts already opened, in substantially the manner adopted in this case; indeed, some savings banks have printed forms for the purpose.

This custom has given rise to much controversy and litigation, and no general rule can be laid down that will govern all cases.

But the mere fact that a deposit is made, so that either of two persons can draw from it, does not of itself suffice as proof of a gift from the original owner of the money to the other party to the account.

The case of Wood v. Zornstorff, 59 App. Div. 538, was a case where the deposit was made in the name of a father and daughter; the daughter kept the pass-book. There was evidence that the father repeatedly asked the daughter for his pass-book, and she promised that she would bring it to him, but did not do so. The court said, amongst other things: "While the bank book during this period was in the name of the father and daughter, it does not necessarily follow from that fact that she was to receive the whole sum upon his death. The intention of the parties in making this transfer to the two, and in keeping it in that form is what must control the solution of this action."

"It may have been placed in the names of the two either to assure title in the survivor or as a matter of convenience for this father in his advanced years to enable his daughter to transact the business for him."

Digitized by Google

Matter of Bolin, 136 N. Y. 177, was a case where a Mrs. Cody, having moneys deposited in a savings bank, withdrew them and redeposited in an account entitled "Julia Cody or daughter Bridget Bolin." A few years prior to Mrs. Cody's death, and while they were both at the bank, the pass-book came into the possession of her daughter, Bridget Bolin, who thereafter retained the custody of it. For many years prior to Mrs. Cody's death she had resided with her daughter, and was supported by her, and by reason of grave physical infirmities, was the object of much solicitude and care on the part of the daughter.

The court said: "All these facts, however, do not suffice to make out the proof of a transfer of title, or of a gift. That the moneys were deposited to the account of 'Julia Cody or daughter, Bridget Bolin,' is not a fact from which any inference of a transfer or of a gift arises. In the absence of other evidence, the transaction simply evidenced a purpose of the depositor of the moneys that they should be drawn out by either of the persons named. The only presumption would be that the depositor so arranged for the purposes of convenience, and that presumption is rather strengthened by the facts appearing, of her helpless condition of blindness and of her other infirmities.

"Nor was the custody of the pass book by the daughter such a possession as evidenced an intention to transfer the ownership of the moneys deposited to the daughter. That is perfectly consistent with the motive of convenience. * * * To constitute a valid gift there must have been the intent to give and a delivery of the thing. The evidence must show that the donor intended to divest herself of the possession of her property and it should be inconsistent with any other intention or purpose."

The evidence in this case abundantly shows an intention upon the part of Mrs. Beers that the plaintiff should have the money in the savings banks after her death. It has been shown by oral testimony and by the will of Mrs. Beers. Practically, she divided her estate into three parts, one part to her grandchildren, one part to her son, and one to the plaintiff; the latter part was to consist of the money in the savings banks to the amount of $7,000.

Digitized by Google

The change of the form of the deposits in the savings banks was in substantial harmony with the provisions of the will, and was doubtless intended to effectuate that provision of the will in relation to the bank deposits; both show the intent of Mrs. Beers that the plaintiff should have the bank deposits upon the death of Mrs. Beers. But the gift was not made one *in præsenti,* it was not made complete; Mrs. Beers did not surrender control over the deposits; she kept them so she could draw them out at any time. She possessed dominion and control over, and the power to recall or nullify all that she had done in relation to them, and when such deposits came to exceed the sum of $7,000. which sum she intended her daughter to receive, she, by the codicil to her will, recalled and nullified all that she had theretofore done in the direction of disposing of the bank deposits, as such. What in De Puy v. Stevens, *supra,* is spoken of as the *locus pœnitentiæ,* the opportunity to repent and change her purpose existed, and she availed herself of it.

It follows from this that the plaintiff is not entitled to the moneys in the defendant savings bank, deposited by the said Kate V. Beers, and that the defendants are entitled to judgment against the plaintiff, dismissing the complaint upon the merits, with costs.

Judgment for defendants, with costs.

HULDAH B. HALLENBECK, Plaintiff, *v.* ALBERT C. HALLENBECK, Individually, ALBERT C. HALLENBECK and WILLIAM T. BEEBE, as Executors, Etc., of HULDAH VAN AERNAM, Deceased, and the ALBANY COUNTY SAVINGS BANK OF ALBANY, Defendants.

(Supreme Court, Albany Trial Term, June, 1904.)

Gift — Ineffectual where the donor at all times retains control of the thing given.

Proof that a depositor in a savings bank, whose rules forbid payment except on presentation of the pass-book, went to the bank and asked the teller to add the name of her niece to the pass-book

Digitized by Google

so that either or the survivor of either could draw the moneys, that the depositor then signed a printed form, which he presented to her, requesting the bank to add the name of her niece "as owner and creditor with me" (these quoted words being printed) of all moneys and interest thereon deposited or to be deposited in her account "with full authority for each, or either of us, or the survivor of us to draw from the said bank the whole or any part of such moneys or such interest," and that the bank account was changed so as to read "Pay to either or the survivor of either" of the said persons, does not show a complete gift of the deposit to the niece, since the depositor, shown at all times during her life to have retained possession of the pass-book, thereby retained control over the money and prevented her niece from drawing any of it except in so far as she permitted the niece to draw some of it by giving her from time to time possession of the pass-book for that purpose.

ACTION brought by the plaintiff to recover from the defendant, the Albany County Savings Bank moneys deposited to the following account: "The Albany County Savings Bank in Account with Huldah Van Aernam or Huldah B. Hallenbeck, pay to either or the survivor of either."

The printed instrument which Huldah Van Aernam signed, referred to in the opinion, read as follows:

"October 7th, 1897.

"The Treasurer of the Albany County Savings Bank.

"Will please add the name of my niece, Huldah B. Hallenbeck, as owner and creditor with me of all moneys heretofore, or which may hereafter be, deposited in said bank under this account No. 12413, together with all the interest which has been or may hereafter be, credited to the said account; with full authority for each, or either of us, or the survivor of us, to draw from the said bank, the whole or any part of such moneys or such interest."

It further appeared that before the death of Huldah Van Aernam, her niece, Huldah B. Hallenbeck, made two withdrawals from the deposit. The court found that Huldah Van Aernam intended that the deposit should become her niece's property upon her own death.

P. C. Dugan, for plaintiff.

Zeb A. Dyer, for defendants.

Digitized by Google

HERRICK, J. I attach no importance in this case to the language of the instrument signed by Mrs. Huldah Van Aernam, by which the bank was authorized to add the name of Huldah B. Hallenbeck as an owner and creditor with Mrs. Huldah Van Aernam of the moneys theretofore deposited by her in the defendant bank.

The evidence shows that upon visiting the bank, Mrs. Van Aernam requested the teller "To add the name of her niece to the pass book, so that either or the survivor of either could draw the moneys." That he thereupon produced a printed form which contained the words "As owner and creditor with me," which he filled out and asked her to sign.

There is no evidence in the case that she asked the bank officer to constitute the plaintiff a joint owner and creditor with her; those words were words furnished to her by the bank officer by means of the printed form, and under the circumstances, cannot be construed as evincing a deliberate purpose and intent on the part of Mrs. Van Aernam to make the plaintiff a co or joint owner and creditor with her, of the moneys theretofore deposited by her in the bank.

I have considered at some length the law in cases of this character, in the case of Kelly v. Home Savings Bank, 44 Misc. Rep. 102, which renders unnecessary any lengthy discussion of this case.

The facts show that Huldah Van Aernam never at any time surrendered dominion and control over the moneys in question.

The words "either to draw," coupled with the possession of the bank-book gave her entire control over the moneys upon deposit; she could withdraw them at any time, and, without possession of the bank-book, the words "either to draw" gave the plaintiff, Huldah B. Hallenbeck, no control or dominion over such moneys.

Under the rules of the bank, which were printed in the pass-book, no money could be drawn therefrom except upon the presentation of the pass-book, so that by the retention of the pass-book by Mrs. Van Aernam, she not only remained in control and dominion of the money, but she also prevented the plaintiff drawing any such money except as per-

Digitized by Google

mitted by her by giving to the plaintiff, from time to time, possession of the pass-book for that purpose. Keeping control of the pass-book kept control of the money, and stripped the transaction of that "quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title." Beaver v. Beaver, 117 N. Y. 421.

Within the authorities referred to in the case of Kelly v. Home Savings Bank, the gift here was not a completed act.

There was only the intention, unaccompanied by such acts as would have carried that intention into effect.

The complaint of the plaintiff, must, therefore, be dismissed.

Complaint dismissed.

THOMAS L. DUNHAM et al., Plaintiffs, *v.* THE BINGHAMTON AND LESTERSHIRE BASEBALL ASSOCIATION et al., Defendants.

(Supreme Court, Broome Special Term, June, 1904.)

Preliminary injunction — Refusal to vacate one obtained in an equitable action brought by owners of property adjacent to a base ball park, conducted by the defendant, where games of base ball are played on Sunday for which an admission fee is charged, to restrain such playing as constituting an invasion upon the said owners' rights of personal liberty and property.

In view of the provisions of Penal Code, §§ 259, 260, 265, relative to the observance of Sunday, there is sufficient doubt as to the legal right of a base ball association to conduct on Sunday a base ball game upon its grounds, for entrance to which an admission fee is charged, to justify the Supreme Court in refusing to vacate a preliminary injunction granted in an equitable action brought by owners of property adjacent to the park against the association to restrain such playing upon the claim of said owners that they are likely to suffer a personal injury from the Sunday games, in that the noise and confusion and public parade of the people incident to the game will deprive them of their usual proper and necessary Sunday quiet and rest, and upon the further ground that by such noise, etc., the actual value of their real property, for residential purposes, will be depreciated.

MOTION to dissolve an injunction.

Digitized by Google

Carver, Deyo & Hitchcock, for plaintiffs.

Harry C. Walker, for defendants.

FORBES, J. This is a motion to dissolve an injunction, procured by the plaintiffs, restraining the defendants from playing baseball on Sunday at their ground in Lestershire.

The question involved in this motion, and in the action to restrain, is the right of the plaintiffs to maintain an action in equity, resting upon the claim that the plaintiffs are likely to suffer a personal injury, and that their property will be depreciated in value, by a violation of the statute against Sunday playing. The question presented does not involve the moral conduct nor the criminal offense of the defendants, under the statute. The claim rests solely upon the right of the plaintiffs to maintain this action in equity, based upon the theory: "That wherever there is an injury there is also a remedy." Butler v. Manhattan R. Co., 143 N. Y. 417.

The plaintiffs are residents and property-owners in the vicinity of the park in which it is proposed to play Sunday games of baseball. Their claim is that the noise, confusion and public parade of the people, incident to the games, will deprive the plaintiffs of and prevent them from taking their usual, proper and necessary Sabbath quiet and rest, during these games, at the place in question. Matter of Rupp & Curtiss, 33 App. Div. 468; People v. Moses, 140 N. Y. 214; People v. Havnor, 149 id. 195.

The plaintiffs also most earnestly maintain that the actual value of their property, for residential purposes, will be depreciated, and that they will be injured in person and property, if the defendants are not restrained. The affidavits used on this motion are so voluminous and contradictory that it would be unwise, at this time, to attempt to decide that question upon the merits.

It is claimed, on the one side, that to restrain the defendants will work great pecuniary injury to the association. This claim is clearly based upon the theory that the defendants have the actual, legal right to conduct entertainments of this character at the place in question; to collect crowds

Digitized by Google

of citizens at that place; to receive fees for admission to the park and to profit by what must now be conceded on other days — to be a popular and interesting sport.

Section 265 of the Penal Code expressly "prohibits playing, * * * or other public sport, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day.

Several other sections prohibit all trades, labor and public traffic on Sundays, except works of necessity or charity. Section 259 defines the Sabbath and declares the purpose for which it was instituted, as follows: "The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community." Section 260 defines Sabbath-breaking as "a violation of the foregoing prohibition."

This language, together with the undoubted trend of judicial authority, directly tends to show that the liberty of conscience and the right of undisturbed repose on the Sabbath are the bases of the plaintiffs' cause of action, upon the theory, that, when a statute is obviously intended to provide for the safety and quiet of a community, it is reasonable; and, where the statute is lawful, a compliance with its purposes must be sustained. City of Rochester v. West, 164 N. Y. 510.

It is true that hundreds of laboring people, who must toil during the balance of the week, get much needed recreation and rest in certain characters of entertainment on Sunday. To deprive them of these pleasures and advantages would be to discriminate against these classes as non-church-going people; the numbers so accommodated and entertained are so great, in proportion to those who do not desire such entertainments on the Sabbath but rather prefer to keep that day as a day of rest and worship, that it may well be said to present a difficult question for solution.

Does the right or wrong of the question depend upon the character of the entertainment? I think so.

Under the statutes of this State, all classes of tradesmen,

Digitized by Google

artisans and business-men, such as merchants, butchers, barbers, saloon-keepers, race-track associations and fairs, are absolutely prohibited, by statute, from opening their places of business, or entertaining the public on Sunday. These statutes must be taken into consideration whenever the moral side of the question comes under review.

What superior right, if any, have the defendants to entertainments of this character, especially at a time and place where individuals are to be annoyed by these games and their property is to be rendered less valuable?

Much may be said in favor of proper Sunday recreation, but is baseball playing so generally attended and has it become such a public necessity, as an amusement, that it ought to be upheld in this community, under the circumstances? To answer this question in the affirmative is to disregard the rights of all other citizens who do not approve of this conduct on the Sabbath, and to imperil their rest and property, by yielding to this custom.

Railroads, steam and electric, in our cities and thickly settled villages, affording to a large portion of the population facilities for attending places of public worship, or modest and quiet recreation, seem to have become necessities to the general public and cannot be discriminated against successfully, since this line of traffic is intended for the interest, benefit and accommodation of the community at large, and takes the place, largely, of other public travel. The same thing may be said of all classes of public service, among which are the telegraph, telephone, electric-light service and necessary travel upon the public streets and thoroughfares.

When a Sabbath entertainment works mischief, annoyance or injury to a community, by being in such close proximity to residential parts of a city or village, if the individual sustains special damages, different from the damage to the whole public, he may maintain an action and have an injunction to restrain that entertainment. New York Cement Co. v. Consolidation R. C. Co., 178 N. Y. 167.

It is, in my judgment, unwise to decide that question upon the merits, in this application, since this question can be disposed of by a trial in a court of equity, where the witnesses

Digitized by Google

can be presented, examined and a fair and just determination reached; and no serious damage or inconvenience will be sustained by the defendants, in the meantime.

The motion to dissolve the injunction is, therefore, denied, with costs.

Motion denied, with costs.

EMILE R. LATTAN et al., Plaintiffs, *v.* WILLIAM H. B. TOTTEN, as Administrator, Etc., et al., Defendants.

(Supreme Court, Kings Special Term for Trials, June, 1904.)

Trust in a savings bank deposit — What acts make its creation doubtful — When a valid trust exists in such a deposit and in bank stock.

It is doubtful whether the mere fact that a person opens a trust account in a bank, for another in his own name as trustee, is sufficient to enable a trial court to find that a valid trust was created.

Where a father opens savings bank accounts in the names of his two sisters, as trustees for his daughters, and delivers the pass-books to the sisters, a valid trust is created for the daughters, and where the trustees subsequently draw the moneys and let the father have them, they are liable therefor to the daughters.

The placing by the father of bank stock in trust for the daughters, in the name of the same trustees, creates a trust for the daughters in respect to the bank stock.

ACTION to recover from the estates of two deceased trustees the amounts of six trusts of money and bank stocks created for the plaintiffs by their father, the money being deposited in savings banks.

Reuben L. Maynard for plaintiffs.

George Richards and Benjamin F. Tracy for defendants.

GAYNOR, J.: Whether the fact of a person opening a trust account in a bank for another in his own name as trustee suffices in and of itself to enable a trial court to make a finding of fact that a trust was created, is certainly open to doubt in view of the largeness of the language in the opinions in *Cunningham* v. *Davenport* (147 N. Y. 43) and *Beaver* v. *Beaver* (117 N. Y. 430). I have heretofore

Digitized by Google

considered the matter in *Jenkins* v. *Baker* (36 Misc. Rep. 55). The later case of *Farleigh* v. *Cadman* (159 N. Y. 169) does not seem to do away with the difficulty of these two opinions at all, it seems to me, as was supposed on appeal in *Jenkins* v. *Baker* (77 App. Div. 509); for in that case the finding of fact was not made on the mere fact of the opening of the account, but on conclusive additional evidence.

But in this case the trust accounts were not opened in the name of the depositor, but in the name of his two sisters to whom the deposit books were delivered. The deposits were made by the father of the plaintiffs in the name of such trustees in trust for the plaintiffs. The trustees from time to time drew out the money and apparently let the father have it. The defendants claim that this fact shows that there was in fact no trust created, but that there were only the forms and appearances of a trust. It seems to me otherwise. The placing of the money in the name of the trustees in trust for the plaintiffs was an unequivocal declaration of trust. It put the fund out of the control of the father. If the trust was for the father it would have been so expressed. The express declaration of a trust for the plaintiffs excluded the idea of a trust for the father instead.

And the placing of the bank stock in trust for the plaintiffs in the name of the same trustees was clearly the creation of a trust in respect of it. The act was in no way equivocal on the question of forming a trust.

People are in the habit of depositing money in their own names in trust for their children or other dependents for the purpose of convenience in keeping separate accounts of expenditures, or of opening several of such trust accounts in savings banks to get around the rule of such banks that they will pay interest on accounts only up to a limited amount of deposit. Hence, the fact of the opening of such an account may be equivocal, and therefore not in and of itself probative of an intention to form a trust; but the present is not such a case.

The administrator of the estate of one of the deceased trustees has not defended, although he answered. The administrator of the estate of the other claims in her answer

Digitized by Google

that if she is liable herein she is entitled to an accounting with the estate of the father, who was made a defendant, and is now represented herein by his administrator, and to have judgment against such estate for such an amount of the said trust funds as shall be found to have been paid to the father. But that issue is not germane to the issue presented by the plaintiffs, and therefore it cannot be tried here, and their case embarrassed and delayed by it.

Judgment for the plaintiffs.

THE PEOPLE OF THE STATE OF NEW YORK *v.* EDWARD POOLE AND ANOTHER, Defendants.

(Before Mr. Justice Gaynor of the Supreme Court as a Magistrate, Kings County, June, 1904.)

Crimes — Playing base ball on Sunday.

Playing on Sunday — a day declared by Penal Code, § 259, as set apart by general consent for rest and religious uses and upon which day the law prohibits the doing of acts which are serious interruptions of the repose and religious liberty of the community — a game of base ball to which the public is invited and for which an admission fee is charged, is a misdemeanor as it is a violation of Penal Code, § 265, prohibiting, upon the first day of the week, "All shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercises or shows".

MOTION to discharge the defendants on the ground that the depositions on which the warrant was granted do not state facts constituting a crime.

John F. Clarke, Dist. Attorney, for people.

Bernard J. York for defendants.

GAYNOR, J.: In the case of *Roth* and others which was recently before me on the writ of *habeas corpus,* the complaint was simply that the defendants played a game of baseball on Sunday. There was no allegation that the game was a public one, or that it disturbed the peace of the day

Digitized by Google

by noise. The complaint presented nothing but the case of ordinary private games of baseball or of golf on Sunday, which have long been allowed unmolested in the open fields in the outskirts of this city, and throughout the State, and which are not prohibited by the statute, as will presently be seen.

The present case is different. The complaint is of a public game of baseball: i. e., of a game held out to the public, i. e., of a game to which the public were invited, and to which an admission fee was charged. Is such a game prohibited by statute? I think it is.

The various penal Sunday statutes were collected together, and re-enacted as a chapter in revised form in our Penal Code, which was passed in 1881. Those curious on the subject may trace them through the Colonial statutes of 1685 and 1695, the Revised Laws of 1813 and the Revised Statutes of 1830.

Section 259 of the Penal Code is as follows:

"The first day of the week being by general consent set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specified, which are serious interruptions of the repose and religious liberty of the community."

This section is a sort of preamble; and it is noteworthy that the "general consent" of the community in observing Sunday is given by it as the reason and basis of our Sunday laws. The wishes of the community, therefore, should have much to do with their enforcement, as is the case with all laws which depend for their vigor on public opinion.

Section 262 summarizes under general heads the acts so prohibited, the second head being in the words "Public sports and shows." This word "public" excludes private sports and shows. This section was repealed in 1883, but reference to it is still necessary in getting at the intention and scope of the whole chapter.

Section 265 enumerates the acts embraced under this head, and is as follows:

"All shooting, hunting, fishing, playing, horse racing, gaming or other public sport, exercises, pastimes or shows,

Digitized by Google

upon the first day of the week, and all noise disturbing the peace of the day, are prohibited."

Here, again, the prohibition seems to be against public acts only. The enumeration of the specific things prohibited is followed by the general clause, "or other public sports, exercises, pastimes or shows." This general clause is not only expressly limited to public sports, etc., but is a continuation of the same category of acts, and not the introduction of a new category. But it suffices for the present case that the general clause is limited to public sports, etc., for unless it embraces baseball, golf and all other games not specified by name in the section, they are not prohibited at all. And a public sport, game, show or entertainment is one held out and given to the public. In 1883 this section was amended by dropping the word "pastimes."

Such is the interpretation of the statute without the aid of any side light. But if we go outside of the statute, and resort to the Holy Scriptures and to Christian rules, as some insist must be done, to aid in getting at its color and scope, and into the intention of the Legislature, the interpretation must remain the same. Physical exercises and games are not forbidden on the Sabbath in the Ten Commandments. Only work is there prohibited. "Six days shalt thou labor and do all thy work, but the seventh day is a sabbath unto the Lord thy God; in it thou shalt not do any work" (Revised Version). Moreover, this commandment relates to the seventh day of the week, and not to the first. In the New Testament there is no Sunday law at all. And in the Christian church there never have been any rules prohibiting physical games and exercises on Sunday. Those who say the contrary only speak at random, and from lack of education. Not long ago a complaint was made to the Archbishop of Canterbury that Mr. Balfour, the prime minister of England, played the game of golf on Sunday. The Archbishop's official response in writing was that "it is certain that the Christian church has never laid down detailed directions affecting the actions of individuals in this matter. Each of them is responsible to God for so using the Lord's day as to fit him best for the working days that follow." It is not

Digitized by Google

to be understood that the Legislature meant to be stricter than the divine law of the Hebrew scriptures, or than the rules of the Christian church, excepting the extent to which it has expressly gone.

And if we view the statute as a health law, we shall still not perceive any intention in it to prohibit all out-of-door games and exercises on Sunday, for to prevent them, especially in the cities, would injure the health of the community and materially increase the death rate. The prohibition is only against public games and exercises, namely, those to which the public are invited, because the statute presumes that they interrupt the repose of the community; and that is the case against these defendants.

Our judicial reports furnish only three cases on the criminality of games or sports on Sunday, owing, no doubt, to the fact that the people of this State have not been prone to meddle with how their neighbors spend Sunday. In the case of *Dennin* (35 Hun, 327) the conviction of the defendant for playing baseball on Sunday was reversed on appeal in the Supreme Court, because the game was not one held out to the public, although played in public view, and there was no evidence that it interrupted the repose of the community. The case against *Moses* (140 N. Y. 214) was for fishing in a stream on Sunday, and the defendant was convicted. Three judges of our highest appellate court voted that the offense was made out by the mere act of fishing, regardless of whether it interrupted the repose of the community. Three judges dissented from this view. The remaining judge of the seven voted to uphold the conviction on the ground that there was sufficient evidence to show that the repose of the community had been interrupted. The decision was therefore indecisive of the question whether the mere act itself constituted a criminal offense, three judges out of the seven being squarely against that view, and another being unwilling to join in it. The *Rupp* case (33 App. Div. 468) was an application to remove a police commissioner for not causing the arrest of persons playing the game of baseball habitually in the same place on Sundays. The evidence there was that the game was a public one, an

Digitized by Google

admission fee being charged, and also that it interrupted the repose of the community; and it was therefore held that the game was a criminal offense. The construction which I give to the statute is in harmony with these decisions.

The motion is denied.

THE PEOPLE ex rel. ANNIE STEIN, Relator, *v.* THE KEEPER OF THE STATE REFORMATORY FOR WOMEN AT BEDFORD, N. Y., and LE ROY B. CRANE, City Magistrate, Respondents.

(Supreme Court, Kings Special Term, June, 1904.)

New York city — Summary jurisdiction of city magistrate under the Public Charities Law.

A city magistrate of the city of New York has no jurisdiction summarily to try and convict a woman between the ages of fifteen and thirty years, sentencing her to three years' imprisonment in the State reformatory.

The Public Charities Law creates no new crime nor does it extend the jurisdiction of city magistrates.

The definition of the offense of being a common prostitute, and its punishment, must be found in the Penal Code and in the Code of Criminal Procedure or in the provisions of the charter of the city of New York, and there is no warrant for the imposition of three years' imprisonment on summary conviction before a magistrate.

DEMURRER to return on writs of habeas corpus and certiorari.

Leonard A. Snitken, for relator.

W. Travers Jerome, district attorney (Robert S. Johnstone, of counsel), for People, etc.

KELLY, J. The relator is brought before the court on writs of habeas corpus and certiorari to inquire into the cause of her imprisonment in the State reformatory at Bedford. The superintendent of the reformatory makes return that she is held under a commitment signed by a city magistrate in the borough of Manhattan, in the city of New

Digitized by Google

York, and from a copy of the commitment attached to the return it appears that the magistrate certifies that on June 10, 1904, the relator was brought before him charged with having been on that day a common prostitute; that she was arraigned before him; that she pleaded not guilty to the charge; that he, the magistrate, thereupon proceeded to try her; that on the conclusion of the trial he convicted her and adjudged her guilty of the charge made against her, and it appearing that she was not insane or mentally or physically incapable of being benefited by the discipline of a State reformatory, he thereupon sentenced her to the State reformatory for a term not to exceed three years with a provision that she might be sooner paroled or discharged pursuant to the provisions of chapter 546, Laws 1896, as amended.

No testimony or record of the proceedings which resulted in the summary conviction and sentence of the relator to imprisonment for three years is returned in obedience to the writ of certiorari directed to the magistrate. He submits a return consisting of a partially filled blank, certifying that the relator was brought before him on the day stated, charged by a police officer in Manhattan with being a common prostitute; he attaches a copy of the complaint, from which it appears that the policeman made oath that at one o'clock in the morning of the day of conviction and sentence, the relator solicited men for the purpose of prostitution, "in violation of the Statute in such case made and provided;" the magistrate certifies that the relator "being called upon to answer and being informed of her rights and of said charge, complaint and testimony did," here follows a blank in the printed form, and the magistrate certifies that he thereupon convicted her of "being guilty of being a common prostitute and committed her to the New York State Reformatory for Women at Bedford, N. Y., pursuant to Chapter 546, Laws 1896, as amended by Chapter 169, Laws 1904."

The relator demurs to the return on the ground that the magistrate was without jurisdiction and had no legal authority to impose upon the relator the sentence set out in the commitment or to issue or make the warrant of commitment.

Digitized by Google

The testimony, if there was any testimony, taken before the magistrate on which he based the conviction of the relator, and her sentence to three years' imprisonment, is not returned in obedience to the writ of certiorari. The learned district attorney in his brief submitted states that "it makes absolutely no difference whether the complaint before the magistrate or the testimony and proceedings before him are returned by a writ of certiorari, because the Supreme Court is powerless to review these proceedings, and if there was no evidence or insufficient evidence to justify a conviction, the judgment will be reversed upon appeal but summary relief cannot be obtained upon habeas corpus." He goes on to state that, in his opinion, the writ of certiorari should not have been issued, "although some judges have issued both writs."

These proceedings present a remarkable condition of things in the administration of criminal law. The writ of certiorari should be obeyed irrespective of the opinion of the district attorney as to the necessity or propriety. It cannot be that this woman is beyond the protection of the law; that she can be arrested, summarily convicted and deprived of her liberty for three years, without evidence or record of the proceedings from which the court may see that at least the forms of law were observed. But there is, in my opinion, no justification for the action of the magistrate. The Public Charities Law, recited in the magistrate's return, creates no new crime. The offense of being a common prostitute is defined and the penalty fixed in the City Charter (§ 1458). A common prostitute who has no lawful employment whereby to maintain herself is a vagrant by section 887 of the Criminal Code. This relator was not convicted under either of the provisions of law cited, because under the charter provision referred to, the magistrate could only require her to give bonds for her good behavior or impose a small fine. It is not charged that she was without lawful employment whereby to maintain herself. The procedure which has resulted in the relator's imprisonment was condemned by this court at Special Term, before Mr. Justice Gaynor. People ex rel. Frank v. Keeper of State Reform-

Digitized by Google

atory, 38 Misc. Rep. 233; People ex rel. Clark v. Same, id. 241; People ex rel. Smith v. Same, id. 243. His decision discharging the relator in the case cited was affirmed by the Appellate Division in this Department in People ex rel. Frank v. Davis, 80 App. Div. 448, and by the Court of Appeals in People ex rel. Clark v. Keeper, 176 N. Y. 465. The courts have held in the cases cited that the Public Charities Law created no new crime. That if the offense charged was a misdemeanor, the city magistrate had no jurisdiction or authority to try it, to convict the alleged offender or impose summarily a sentence exceeding in its severity the punishment for misdemeanor and for certain felonies. Mr. Justice Woodward, writing for the Appellate Division in the Frank case, said: "We cannot believe that the Legislature, which has expressed no such intention, contemplated that persons convicted of offenses with a limited punishment attached, not amounting to misdemeanors, should, at the discretion of a single city magistrate, be deprived of their liberty for a period of three years. This would be to deprive the relator of the right or privilege accorded to every citizen of this State, to be secure in his life, liberty and property unless by the law of the land or the judgment of his peers. State Const., art. I, § 1."

The reformation of the unfortunate class of persons to which the relator is alleged to belong is a laudable object. It has engaged the attention of the charitable, religious and philanthropic for all time. But it will never be accomplished by violating the rights accorded by our Constitution and law to the most hardened criminal. That this woman can be taken on the street at one o'clock in the morning, charged with this offense on the oath of a police officer and, on the same day, without evidence, so far as it appears, without counsel and without the trial which is guaranteed to all citizens accused of crime, be convicted and sentenced by a single magistrate to three years' imprisonment, is repugnant to the spirit of the laws. As was said by the Appellate Division in the Frank case, "while it may be proper to permit city magistrates to summarily convict and punish minor offenses not amounting to misdemeanors or in cases of a charitable

Digitized by Google

or corrective nature for persons of immature years, it can hardly be necessary to vest the power to deprive a citizen of his or her liberty for a period of three years, in a city magistrate where the statute defining the offense limits the power of punishment to a petty fine of ten dollars and the giving of a bond for good behavior."

The magistrate had no jurisdiction or authority to sentence the relator to three years' imprisonment in the State reformatory, and I direct that she be discharged from imprisonment.

Relator discharged.

Matter of the Application of the CITY OF NEW YORK, Relative to Acquiring Title to EIGHTH STREET, Etc.

(Supreme Court, Kings Special Term, June, 1904.)

New York city — Interest, on an award for property condemned, when title is vested in the city before confirmation of the commissioners' report.

When, under the provisions of the charter of the city of New York, the city takes property in advance of the termination of the condemnation proceedings and before confirmation of the commissioners' report, the commissioners have no power to assess any part of the interest allowed to the property owner, as compensation for such preliminary taking, upon such property owner.

MOTION to confirm report of commissioners of estimate and assessment.

John J. Delany, Corporation Counsel (James D. Bell and James F. Quigley, of counsel), for motion.

Michael Furst (Joseph A. Burr, of counsel), for property-owners, opposed.

KELLY, J. I will not interfere with the decision of the commissioners in the matter of dividing the assessment for benefits. That was a subject peculiarly within their jurisdiction, and their judgment should not be disturbed save on

Digitized by Google

clear and unmistakable evidence of error or injustice. The case does not present such erroneous principles. See Long Island R. R. Co. v. Reilly, 89 App. Div. 166; Matter of Willink Entrance, decided June 17, 1904. Nor do I think the failure to award interest on the allowance for damages for change of grade calls for the denial of the motion to confirm their report.

But notwithstanding the court's reluctance to prolong the proceedings, and I am free to say that I cannot understand the delay in completing these street opening proceedings as compared with other proceedings under the Condemnation Law, in which other classes of corporations are plaintiffs, I am of the opinion that the commissioners had no right to assess any part of the interest allowed the property-owner on the taking of his property before payment, back on the identical property-owner who receives the interest. If the provision which allows the municipal corporation to take the property of the individual against his will, for the public use, in advance of compensation and payment is constitutional, and it is easy to see how it can work great hardship in particular cases, it is justified only on the theory that the individual citizen receives something in the way of compensation. This is attempted to be provided for by allowing him interest on the value of his land from the date when he is deprived of it by force of the law, although his house and shelter may be taken from him and he must await the termination of these lengthy proceedings before he receives the wherewithal to supply the loss. But to say that any part of this interest compensation may be taken from him in the same proceeding, under guise of an assessment, or in any other way, seems to me to be in contravention of elementary principles of fair dealing, if indeed it does not destroy the very argument on which the constitutionality of the taking is based. I must, therefore, sustain the objection to the action of the commissioners in assessing any part of the interest awarded to the owner, Rogow, as compensation, back to his remaining property.

Ordered accordingly.

Digitized by Google

MARY HUGHES et al., Plaintiffs, *v.* MARGARET GOLDEN et al., Defendants.

(Supreme Court, Kings Special Term, June, 1904.)

Partition — Unsecured creditors, of the deceased owner of the fee, when protected in partition — Avoidance of multiplicity of actions — The creditors may reach personalty which the administrator paid for the transfer tax on realty descending to the heirs.

Where unsecured creditors, of a decedent intestate whose personalty proved insufficient to pay his debts, and who, as well as the administrator of the decedent, took no proceedings to sell his real estate for his debts within three years after letters of administration were first issued upon his estate, are made parties to an action, brought by the heirs, to partition his real estate, and it therein appears that, on the final accounting of the administrator to which the heirs of the decedent were parties, the claims of these creditors were established, the Supreme Court will, in the action of partition, protect the creditors and, to avoid multiplicity of actions, will not remit them to their action against the heirs under Code Civ. Pro., § 1843, it appearing that there are many heirs, that some are non-residents of the State of New York and that the shares of some are very small.

Where it appears that the administrator has paid from personalty the transfer tax on realty, to which the heirs succeeded under the decedent, the administrator is subrogated to that claim for the benefit of the creditors.

MOTION to confirm referee's report in partition and hearing of exceptions, filed by unsecured creditors who were found by the referee to have no lien upon or interest in the real estate or proceeds of sale.

Thomas F. Murtha, for plaintiffs.

Smith & Campbell, for creditors.

R. M. Cahoone, for administrator.

MADDOX, J. The personal estate is the primary fund for the payment of debts and when found to be insufficient, the land may be resorted to, but such proceedings must be had within three years after letters were first issued. Code Civ. Pro., § 2750. Here that period of time has long since

Digitized by Google

elapsed, and though the personalty was insufficient, such proceeding was not instituted by the administrator or any creditor. The account of the administrator has been settled and passed, and the claims of the creditors have been established on the accounting proceeding to which it appears the heirs were parties.

While the creditors are not necessary parties to this action, still they are before the court, and in equity their rights should be protected; if not protected here they will be remitted to their action against the heirs under section 1843 of the Code of Civil Procedure, and many of such heirs are non-residents of the State and of the county, and the shares of some are very small, viz.: the one-seven hundred and thirty-fifth part. To so remit the creditors would result in a multiplicity of actions, when all right can be determined here.

The administrator has paid from the personal estate the transfer tax, a claim against those to whom the property descended, and in equity the administrator is subrogated to that claim for the benefit of the creditors, for they had the right to the application of such personalty to the payment of their debts.

Let report be modified so as to provide for the payment of the creditors, or of a sufficient sum to the administrator, to enable him to pay said creditors.

Referee's report modified.

BERTHA A. McCALL, Plaintiff, *v.* THE CITY OF ROCHESTER, Defendant.

(Supreme Court, Monroe Trial Term, June, 1904.)

When payment of an assessment for a local improvement, valid on its face but void for facts dehors the record, has not been made under duress of law — Such an assessment must be set aside before the payment can be recovered — Power of the Legislature to prohibit an action to recover an invalid assessment for a local improvement, except upon compliance with certain conditions.

Where an owner of land upon which has been laid an assessment, apparently valid but actually void by reason of facts *dehors* the record, pays the assessment with full knowledge of those facts

Digitized by Google

before any attempt has been made to enforce it, he cannot recover of the municipality the payment as one made under duress of law, nor can he recover it at all unless the assessment is first set aside.

The charter of second class cities (L. 1898, ch. 182, §§ 466, 467) providing, in section 466, an exclusive remedy for the party aggrieved, in the case of assessments alleged to be void for fraud, defect in the work or substantial error, and precluding any resort to a bill in equity, is a valid enactment as there can be no question of the power of the Legislature to prohibit an action to recover an invalid assessment for a local improvement, except upon compliance with certain conditions.

ACTION to recover from the city of Rochester the amount of an assessment paid by plaintiff to said city.

Curtis Fitzsimmons, for plaintiff.

William A. Sutherland, for defendant.

DAVY, J. This action is brought to recover from the city of Rochester seventy-eight dollars and sixty-two cents, paid by plaintiff to the city treasurer for the Pierpont avenue improvement assessment. The plaintiff contends that the assessment was illegal and void for the reason that no portion of her land fronted on Pierpont avenue; that between her property and the avenue there is a strip of land two feet wide which she does not own.

It appears from the testimony taken upon the trial that at the time the assessment was made the plaintiff had a deed of the property in question. She also claimed to be the owner thereof and signed a remonstrance to the common council against the improvement. She owned or pretended to own the property at the time fixed by law for determining who should be assessed therefor as owner. The assessors, therefore, obtained jurisdiction of the plaintiff and the subject-matter and the tax-roll when completed by the assessors formed the basis on which the tax was imposed. If the assessment was void for want of jurisdiction as claimed by the plaintiff, she was under no obligation to have paid it. She stood in no danger of having the assessment or any

Digitized by Google

portion thereof against her premises collected if she had seen fit to have resisted its collection.

In Trimmer v. City of Rochester, 130 N. Y. 405, Follett, Ch. J., said: "There is a broad distinction between an assessment which is illegal by reason of the existence of some fact outside of the record, and one void on the face of the record, for lack of jurisdiction of the person or property, or by reason of the unconstitutionality of the statute under which the assessment is made."

It was held in Tripler v. Mayor, 125 N. Y. 623, that in order to maintain an action to recover back money paid in satisfaction of an illegal assessment, it must appear that the payment was made in ignorance of the invalidity of the assessment or through some legal coercion.

Where one upon whose land an assessment is laid apparently valid, but by reason of the facts outside of the record actually void, pays it with full knowledge of these facts before any attempt is made to enforce it, the payment cannot be regarded as an involuntary payment by coercion in law. But assuming that the assessment is illegal and the plaintiff has not waived her right to recover the same, the question arises whether she can maintain this action until the assessment is first set aside.

The White Charter, so called, for the government of cities of the second class, which includes the city of Rochester, was passed in 1898 (Laws of 1898, chap. 182), and became effective January 1, 1900.

The assessment-roll for the improvement of Pierpont avenue was completed by the assessors and confirmed by the common council March 13, 1900. The assessment, therefore, which the plaintiff seeks to recover in this action was made after the present city charter went into effect and comes within the provisions of sections 466 and 467 of the charter.

Section 466 provides that: "If, in the proceedings relative to any assessment or assessments for local improvements in the city, or in the proceedings to collect the same, any fraud or defect in the work, or substantial error, shall be alleged to exist or to have been committed, the party aggrieved thereby may, within twenty days after the com-

Digitized by Google

pletion of the assessment, apply to have the assessment vacated or reduced, to a judge of the Supreme Court, at special term or at chambers, or to the county judge, who shall thereupon, upon due notice to the corporation counsel, and to the contractor and his sureties, or any other person, if they, or either of them, be proper persons, proceed forthwith to hear the proofs and allegations of the parties."

Section 467 provides that no suit or action in the nature of a bill in equity or otherwise shall be commenced to vacate any assessment in the city or to remove a cloud upon title arising from any assessment. It also provides that owners of property shall, in proceedings to vacate or stay payment of assessments, be confined to the form of proceeding mentioned in section 466, and it also authorizes the court to direct that any issue or issues of fact be tried before a jury. It is evident that this statute was intended to prevent the vacation of any assessment by any suit or action in the nature of a bill in equity and to confine owners of property in cases of alleged void assessments to these remedies provided in section 466 of the city charter. It is not claimed that this assessment which has been paid and which is sought in this action to be recovered back has been annulled.

Section 1 of chapter 910 of the Laws of 1896 provides that: "Whenever an assessment for a local improvement has been annulled by the judgment or order of any court any sum of money which has been heretofore, or shall be hereafter paid thereon, may be refunded with interest from the time of such payment. If not so refunded within one year, from the time of such judgment or order annulling such assessment, an action may be maintained to recover such sum with interest thereon."

It was held in Trimmer v. City of Rochester, *supra*, that where money has been collected under an assessment for a local improvement which is valid on the face of the record, but is illegal by reason of some fact outside thereof, it cannot be recovered back until the assessment is set aside.

Palmer v. City of Syracuse, 67 App. Div. 270, was an action to recover certain sums of money paid for local improvements on the ground that the assessments were invalid.

Digitized by Google

The court held that the action could not be maintained for the reason that the assessments, although conceded to be invalid, had not been set aside; that the provisions of the charter require that the assessments must be first set aside, and after that has been accomplished the municipality has a year in which to refund the money. Judge Spring, in speaking for the court, said: "The intention of the lawmakers evidently was to give the municipal authorities a reasonable time in which to raise the money to meet an unexpected call upon their resources, and the statute guards the rights of the person who has paid the illegal tax for this delay by allowing him interest on the money so paid."

Wallace v. Mayor, 53 App. Div. 187; affd., 165 N. Y. 658; Trimmer v. City of Rochester, *supra;* Scudder v. Mayor, 146 N. Y. 248.

This provision of the city charter is almost identical with chapter 410 of the Laws of 1882, known as the "New York Consolidation Act," and the question of the power of the court, under that act, to restrain the city from collecting an illegal assessment levied for street improvement arose in Sixth Ave. R. R. Co. v. Mayor, 17 N. Y. Supp. 904. In that case the court at General Term, in the First Department, held that section 897 of the Consolidation Act expressly provides that no suit or action in the nature of a bill in equity, or otherwise, shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall be confined to their remedies in such cases to the proceedings under that act. This provision was held in Mayer v. Mayor, 101 N. Y. 284, to be unqualified and to apply to every class of assessments. Matter of Bridgford, 65 Hun, 227.

There can be no question but that the Legislature has the power to prohibit an action to recover an invalid assessment for a local improvement unless certain conditions are complied with.

In Loomis v. City of Little Falls, 176 N. Y. 31, the court held that the Legislature having the power to absolutely prohibit an action to set aside, cancel or annul any assessment made for local improvements, such power necessarily

Digitized by Google

includes the power to prohibit the commencement of such an action unless specified conditions are complied with. Chief Judge Parker, who wrote the opinion of the court, said: "It is an acknowledged branch of equity jurisdiction to remove clouds from the title to real property, but the legislature has the power to deprive parties of that particular remedy. It may not deprive them of every remedy, but so long as an adequate remedy is afforded to a party injured the legislature acts within its authority when it deprives the courts of power to give relief in certain forms of actions."

I am of the opinion that the plain provisions of the charter compel me to hold that this action cannot be maintained. The complaint, therefore, is dismissed, with costs to the defendant.

Complaint dismissed, with costs.

PETER THANEY, as Administrator, Etc., Plaintiff, v. THE A. FRIEDERICK & SONS CO., Defendant.

(Supreme Court, Monroe Trial Term, June, 1904.)

Negligence — Not actionable unless there is a violation of a legal duty to exercise care — Liability, as between independent contractors, for the death of a workman of one of them.

There is no negligence, in a legal sense, which can give a right of action unless there is a violation of a legal duty to exercise care.

Where neither the contract of an independent contractor, for the mason work of a building in process of construction, nor any law requires him to place guards around the elevator shafts in the building or keep its floors clear from bricks and mortar naturally accumulating thereon, proof that a workman, of an independent contractor for the electrical lighting of the building, whose work required him to use a workbench of his master located on the floor below and who in order to reach the workbench had to descend a ladder and travel through a corridor and over a pile of brick and mortar left by the mason work contractor opposite an elevator shaft, was last seen at night at the top of the ladder and soon found dead at the bottom of the shaft, which had been left un-

Digitized by Google

guarded, does not entitle his administrator to recover damages for his death of the mason work contractor, it appearing that the corridor was well lighted and the workman familiar with the approach to the workbench.

ACTION for negligence; motion for a new trial.

Louis E. Fuller, for plaintiff.

Edward Harris, Jr., for defendant.

DAVY, J. This action is brought to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant.

The accident occurred on the evening of November 6, 1902, in the Masonic Temple, located on Clinton avenue, north, in the city of Rochester, which was being built by contract and only partly completed. The defendant was doing the mason work on the building under a contract with the Masonic Temple Association. Rudolph Schmidt & Co. were the contractors for the electrical work and the plaintiff's intestate, who was in the employ of Schmidt & Co., was assisting the electricians in installing the electric wires in the building at the time of the accident. The defendant and the electrical company were independent contractors.

At the southwest corner of the fourth floor of the building was a work bench which was used by the intestate and the other employees of Schmidt & Co.; on this floor was a pile of broken brick and mortar. There were no guards around the elevator or stair wells; on the night of the accident the floor, elevator and stair openings were all well lighted. The pile of brick and mortar in the corridor opposite the stair and elevator wells had been there ten days or two weeks and during that time the intestate had traveled over them several times each day and during the evening of the accident he had passed over the pile of brick six or eight times in going to and coming from the fifth floor to the work bench. The intestate and his co-workers were enabled to go up and down from the fourth to the fifth floor by an ordinary ladder, put there by the employees of Schmidt

Digitized by Google

& Co.; the last that was seen of the intestate before the accident was when he was at the top of the ladder on the fifth floor. He was found dead at the bottom of the elevator well soon thereafter; no one saw him fall, and whether he slipped and fell from the ladder or slipped on the pile of brick and mortar on the fourth floor, no one knows; it is wholly a matter of speculation.

It clearly appears from the testimony taken upon the trial that the defendant in constructing the building and permitting the brick and mortar to remain on the floor and the elevator and stair openings to remain unguarded did not violate his contract or create a nuisance, or violate any rule of law.

There was no duty imposed by law or by contract on the defendant to prevent the employees of Schmidt & Co. from climbing the ladder and walking over the floor upon which the brick were piled. The defendant was a mere contractor to do the mason work and had no control over the intestate and could not prevent the employees of Schmidt & Co. from coming into the building and going where they pleased; they came there by permission of the owners and not by invitation of the defendant.

The defendant did not agree in its contract with the owners of the building to place guards around the elevator and stair openings and to keep the floors clear of brick and mortar and guard and protect the employees of Schmidt & Co. from accidents.

As between the Masonic Temple Association and the defendant, the obligation of the latter extended no further than to perform its part of the contract for the construction of the building according to its terms with reasonable skill; it owed a duty to its employees to furnish them a reasonably safe place to work, but it owed no such duty to the employees of Schmidt & Co. If the plan and construction of the building were such as to make it necessary and proper to erect guards around the elevator and stair openings to protect other independent contractors doing work in the building, it was the duty of the Masonic Temple Association to have contracted with the defendant to take such

Digitized by Google

precautionary measures. In that event the duty of erecting guards would have devolved upon the defendant and it would have been liable for all accidents arising from any neglect on its part to comply with the requirements of the contract. I am unable to see under what rule the defendant could be required to keep the place safe for the employees of Rudolph Schmidt & Co. to do their work, or to take measures to prevent persons from falling into openings in the building while in process of construction and necessary to be made in order to complete the building according to the terms of the contract. City of Buffalo v. Holloway, 7 N. Y. 493; Storrs v. City of Utica, 17 id. 109.

In Mayor v. Cunliff, 2 N. Y. 172, Judge Cady, in speaking for the court, said: "I have found no case in which a person had been held liable for negligence in the performance of any work, unless his negligence was in violation of a contract, express or implied, or of a duty which was imposed on him by law."

In Larmore v. Crown Point Iron Co., 101 N. Y. 394, Judge Andrews said: "There is no negligence in a legal sense which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances."

Judge Parker, in discussing the question of negligence in Cosulich v. Standard O. Co., 122 N. Y. 126, said: "The court failed to recognize a distinction, which had been carefully guarded by the courts of this state as well as by nearly all other jurisdictions in this country, between actions founded in negligence, where a contract relation existed between the parties, and those in which the defendant owed no other duty than to use such ordinary care and caution as the nature of his business demanded to avoid injury to others."

The defendant had no right to intentionally injure the intestate and would be liable if it needlessly or carelessly injured him while performing its own work. It owed him a duty to abstain from creating a nuisance or a snare in

Digitized by Google

the building that might injure him, but it did not owe him the duty of active vigilence to see that he was not injured while engaged in doing Schmidt & Co.'s work.

It has been held that there is no negligence in a legal sense which can give a right of action unless there is a violation of a legal duty to exercise care. To establish a cause of action it must appear that the defendant owed some duty to the intestate which it has failed to discharge and that the neglect was the cause of the injury. Splittorf v. State of New York, 108 N. Y. 205.

I am unable to discover upon the evidence that any duty rested on the defendant to keep the floor clear of brick or to erect guards around the elevator or stair openings. The deceased at the time of the accident was in every legal sense a stranger to the defendant. There is no evidence in the case that the accident was caused by any negligence on the part of the defendant. It was using brick and mortar in the construction of the building and refuse would naturally accumulate on the floor. Hence, if the defendant can be held liable in this case, it must be upon the naked ground that it is responsible for the careless acts of the intestate over whom it had no control. I know of no authority for imposing such a liability under such a state of facts.

It was held in Roulston v. Clark, 3 E. D. Smith, 366, that where a party is engaged in erecting a building upon his own ground, he is not, nor are his neighbors, bound to put up temporary partitions about stairways, nor floors across beams nor use other means, for the protection of those who voluntarily enter the unfinished building and venture to walk across the beams or around its well holes.

In Castle v. Parker, 17 Law Rep. (N. S.) 367, the plaintiff, a custom-house officer, had been in the habit of making use of a passage through the inside of a building in the course of erection, which was left open at both ends, to obtain access from the street in one side to certain bonded vaults on the other side, which it was his duty to superintend. The defendant was the subcontractor for the construction

Digitized by Google

of the pavement and other stonework on the passages of the building. The plaintiff, in passing through the passage, fell down an opening and was injured. The regular mode of access to the vaults was not through the passage, but through a gateway from the street. Held, that no obligation lay upon the defendant to take precautions to guard the plaintiff from such an accident and, the building being unfinished, if any license could be inferred to have been given to the plaintiff, it must be subject to the obvious risks incident to the condition of the building.

When injury occurs to a person from the act of one in doing his lawful business in a lawful way, the question arises at once whether he was under any legal obligation to look out for the protection of that particular person under those particular circumstances. For the law does not require vigilance in all cases or on behalf of all persons. In every case of negligence the plaintiff must point out the omission of duty or the negligent act which caused the injury and how it arose. In this case the plaintiff has failed to show that the defendant has violated any duty imposed upon it by law or by contract.

The corridor and fourth floor were well lighted at the time of the accident and the danger of the situation in performing the work was plain to be seen by the plaintiff's intestate and by other persons engaged in working on the building.

We will assume, for the purpose of the argument, that the relation of master and servant existed between the plaintiff's intestate and the defendant and that the defendant was negligent in not removing the brick and placing guards around the openings. I do not see how the defendant even then could be held liable. The performance of the work on a building partly completed necessarily renders it hazardous for the employees. The danger arises from the very nature of the work upon an unfinished building. The peril in going around the building during the process of construction was perfectly obvious to the intestate. Nothing was concealed; he was not led into any trap. Under the circumstances that existed in this case at the time of the accident, the plaintiff

Digitized by Google

could not recover, even if the relation of master and servant had existed.

The rule is well settled that a servant assumes not only the risks incident to his employment, but all dangers which are obvious and apparent and waives any claim for damages against the master in case of personal injury. Maltbie v. Belden, 167 N. Y. 307.

It is evident that the deceased assumed the risk of accidents while working in the building in its unfinished condition and the plaintiff cannot recover. The nonsuit, therefore, was properly granted and the motion for a new trial is denied.

Motion denied.

CHARLES STEIN et al., Plaintiffs, *v.* MICHAEL MARKS et al., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Action in equity by members of a membership corporation, illegally suspended, to restrain the controlling faction from using or disposing of the corporate property except as provided in the certificate of incorporation and from excluding the plaintiffs from the rooms and the meetings — Disciplinary action of such a corporation when valid — When a suspension and an expulsion are illegal — The rights of such a corporation are derived from its charter and not from the constitution it may adopt — Such a corporation when organized to maintain a club for social and literary purposes cannot lawfully pledge its support to a political party or suspend or expel a member for withdrawing his support from that party — Unconstitutional interference with the right of suffrage — When the action will lie in equity — Inadequacy of the remedy at law.

No disciplinary action taken by a membership corporation will be valid unless taken as prescribed by its bylaws and the statutes governing its procedure.

A suspension of certain of its members attempted to be made at a meeting of members, not called by a quorum of seven of them and upon notice to all members as required by the bylaws of the corporation, is not a meeting of the corporation and it can take no corporate action.

A member of such a corporation entitled to rights of property or privileges therein cannot be expelled therefrom without being given

Digitized by Google

notice of the charge preferred and an opportunity to be heard in his defense.

The members of such a corporation derive their rights primarily from the charter or certificate of incorporation, the bylaws adopted in conformity therewith and the statutes regulating such a corporation, and any constitution subsequently adopted by the corporation — which constitution is merely part of the bylaws — must be consistent with the certificate of incorporation.

A certificate, stating the objects of such a corporation to be the maintenance of a club for social and literary purposes, affords the corporation no authority or power to adopt a constitution, bylaws and rules, pledging the members always to support a certain political organization, not to belong to or support any other political party, declaring that any member expelled for treason to that political party should not be reinstated under any circumstances and that, in case of struggle, dispute or conspiracy in the ranks of the society, seven members abiding by the constitution of the political organization should be a sufficient number to constitute themselves the society and control its property — as these provisions are not consistent with the social and literary purposes for which the corporation was organized.

Moreover, it is unreasonable that a member of a corporation incorporated for such purposes should be subject to expulsion because he does not hold a certain political faith; and, additionally, the object sought to be effected by these bylaws is contrary to section 1 of article I of the Constitution of the State of New York, providing that "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

Bylaws which compel a member to give up, under penalty of expulsion, the free exercise of his right of suffrage, conflict with the above constitutional provision.

Members of such a corporation, when illegally suspended for alleged disloyalty to the corporation in that they had withdrawn or threatened to withdraw their support from the political organization which the corporation was pledged to support, and when thereafter excluded from the club and its meetings, may maintain an action in equity against the members in possession and control to enjoin them, declare void their unauthorized acts, compel such administration of the corporate affairs as is orderly and prescribed and prevent a diversion of its assets to any purpose other than that for which the corporation was organized.

The remedy at law, by an action against the individual defendants for damages or a mere direction to recognize the plaintiffs as members, would be inadequate.

Digitized by Google

ACTION for an injunction.

Klein & Burkan, for plaintiffs.

Benjamin Patterson (George Bell, of counsel), for defendants.

CLARKE, J. The plaintiffs allege that they are members of the Excelsior Literary Society, a membership corporation, and bring suit against other members and the corporation. The relief prayed is that defendants be enjoined and restrained from disposing of the property of the corporation or from using it, except as provided in the certificate of incorporation, and from interfering with the plaintiffs in the exercise of their rights as members, and from preventing their access to the rooms, and from attending and voting at corporate meetings, and from interfering with certain of the plaintiffs as officers in the exercise of their powers and duties; that the defendants be enjoined from admitting new members, except as provided by the constitution and by-laws, and that certain of the defendants be enjoined from acting as officers of the corporation, and that all acts done in violation of the plaintiffs' rights be adjudged void. The answers deny that plaintiffs are members and officers in good standing and allege that plaintiffs have an adequate remedy at law. The corporation was organized under the Membership Corporations Law and its objects were defined in its certificate of incorporation to be: "To advance the mental development of the members by means of literary exercises, debates and lectures and to foster sociability among its members; also to provide a clubroom or house for the use of said members." Some time after the incorporation a constitution was adopted pledging the support of the corporation to another organization formed for political purposes. The corporation subsequently appointed a committee to report on the advisability of amending the constitution so as to withdraw the support of the corporation from this political organization. On September 29, 1902, the meeting, at which this committee was to report, was broken up and no

Digitized by Google

vote was permitted to be taken upon the report. It also appears that the plaintiffs have ever since been refused admission to the clubrooms and prevented from attending meetings and from taking part in the affairs of the corporation, on the ground that they were suspended and subsequently expelled, and on the further ground that the plaintiffs had forfeited their membership because they had not remained loyal to the society. It is well settled that no judicial tribunal will interfere with the internal government of the affairs of either voluntary associations or membership corporations where the action complained of has been fairly taken in conformity with the reasonable by-laws and regulations adopted for the orderly administration of their affairs. Baxter v. McDonnell, 155 N. Y. 83, 101; Matter of Haebler v. New York Pro. Exch., 149 id. 414, 427; Lewis v. Wilson, 121 id. 284. But such bodies must conform to their own rules and regulations and no disciplinary action will be valid unless it be taken as prescribed by their by-laws and the statutes governing their procedure. People ex rel. Deverell v. Musical M. P. Union, 118 N. Y. 101. In the case before me the meeting of September twenty-ninth was broken up (by whom is immaterial) and the defendants and their friends met on the next evening and attempted to suspend the plaintiffs. This meeting was not a meeting of the corporation. It was neither an adjourned meeting, for there had been no adjournment, nor a special meeting, for it was not called by a quorum of seven members and upon notice to all members by the secretary, as provided by article 2, section 4, of the by-laws. Were there no such by-laws, notice to members would, nevertheless, be necessary to enable the members to take corporate action. The rule is well stated in People v. Batchelor, 22 N. Y. 128, 134: "It is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons, can be legally exercised without notice to all the members composing such body," and the statutes of this State expressly secure to every member his right to vote at every meeting of the members of any corporation, unless he be disqualified by the certificate of

Digitized by Google

incorporation or the by-laws (section 20, General Corporation Law). Moreover, had this meeting been properly called the action taken against the plaintiffs must nevertheless be held void. A member of a voluntary association or corporation, who is entitled to privileges or rights of property therein, cannot be expelled therefrom without notice of the charge preferred against him and an opportunity to be heard in his own defense. Wachtel v. Noah W. & O. Soc., 84 N. Y. 28; People ex rel. Johnson v. New York Prod. Exch., 149 id. 401, 409; Loubat v. Le Roy, 40 Hun, 546. The by-laws of this corporation, by article 10, properly provide for such notice and hearing, but no notice nor hearing was given the plaintiffs. The subsequent proceedings against the plaintiffs, in January, 1903, were equally objectionable. The plaintiffs were not only excluded from the meeting, but the committee which tried them consisted of persons who had never been elected members of the society. The defendants and their associates have proceeded in violation of their own rules and regulations, in violation of the law and with utter disregard of that fair dealing which should be characteristic of the administration of justice, whether by laymen or by the courts. But the defendants urge that the plaintiffs have forfeited all rights as members of the society because of their disloyalty to its constitution; that the rights of the members of the corporation were determined by the constitution; that the constitution of the society pledged the support of the corporation to the political organization, and when the plaintiffs attempted to withdraw that support they forfeited their rights as members whether they constituted a majority or not. It is true a minority can insist upon carrying out the purposes of the society, at least so far as property is concerned, whether the society is incorporated or voluntary. The rule was early applied to church organizations. Watson v. Jones, 13 Wall. 679, 723. In McGinnis v. Watson, 41 Penn. St. 9, it was held that "title to church property adheres to that party which is in harmony with its own laws." So also where a lodge withdraws from the jurisdiction of a

Digitized by Google

grand lodge, surrenders its charter and forms a new lodge, the members who continue steadfast in their allegiance are held entitled to the property of the society. Altmann v. Benz, 27 N. J. Eq. 331; McFadden v. Murphy, 149 Mass. 341; Gorman v. O'Connor, 155 Penn. St. 239. These cases upon which the defendants rely are all in one of two classes. Either the offender was disloyal, in the case of a voluntary unincorporated association, to its constitution, or, in the case of a corporation, the offender was disloyal to the objects stated in the charter or certificate of incorporation. The error in the defendants' position is that they are members of a corporation whose members derive their rights primarily from their charter and not from the constitution. In the case of voluntary or unincorporated societies the rights of the members depend upon the constitution or articles of association. Belton v. Hatch, 109 N. Y. 593. The relation is contractual and a member acquires only such rights as the constitution and by-laws of the association give him, and the courts will not interpose its control unless public interests intervene. White v. Brownell, 4 Abb. Pr. (N. S.) 162, 191; O'Brien v. Grant, 146 N. Y. 163, 173; Weston v. Ives, 97 id. 222; Hess v. Johnson, 41 App. Div. 465; Lafond v. Deems, 81 N. Y. 508. But in the case of a corporation the rights of the members are dependent upon the powers of the corporation derived from the State as set forth in its charter or certificate of incorporation, the by-laws adopted in conformity therewith and the statutes regulating such corporation. White v. Brownell, *supra;* People v. N. Y. Commercial Assn., 18 Abb. Pr. 271; Matter of Haebler v. New York Prod. Exch., 149 N. Y. 414, 427; Hellenberg v. District No. 1, I. O. O. B., 94 id. 580, 584. The constitution adopted by a corporation is merely a part of its by-laws and must be consistent with its certificate of incorporation. Membership Corporations Law, § 8. If the constitution of this society were the original compact of an unincorporated association, or if its terms were included in the purposes and objects stated in its charter or certificate of incorporation, the contention of the defendants would be well made. There is

Digitized by Google

no objection to the formation of voluntary associations or of membership corporations to further and advance political beliefs and associations and corporations are frequently organized for such purposes. The fact that the plaintiffs have not been steadfast in their political allegiance is sufficient ground to exclude them from the unincorporated political organization, but it will not deprive them of their statutory rights as members of the corporation. People ex rel. Dilcher v. German U. Ev. Ch., 53 N. Y. 103. The Excelsior Literary Society was formed, as its certificate of incorporation provides and its name indicates, for social and literary purposes. There has been no disloyalty to the corporation on the part of the plaintiffs. They have remained steadfast to the purposes for which it was formed. In fact, the very act for which the defendants seek to exclude them was an attempt on their part to so amend the constitution as to make it conform to the purposes of the incorporation by disassociating the society from the political organization. It is obvious that members of a corporation, who have the power to adopt a constitution and by-laws, necessarily have the right to alter or amend them. In the case of this society the method of amendment is expressly provided by sections 13 and 16 inclusive of the by-laws, and the plaintiffs were proceeding in conformity therewith. But the argument is made that members of a corporation are bound by their own by-laws; that the by-laws of this corporation pledged the support of its members to the political organization and that the plaintiffs had acquiesced therein by becoming members. The general rule is that "when an individual joins an incorporated club or legally organized body with power to make laws and rules for its own government and for the regulation of the conduct of its members, the member becomes bound by those laws and rules." Baxter v. McDonnell, 155 N. Y. 83, 101. But the by-laws, rules and regulations of a membership corporation must be reasonable and adapted to the purposes of the corporation. They must not be contrary to nor inconsistent with the laws of the State. Membership Corporations Law, § 8; People v. Medical Soc., 24 Barb. 570; People v. St. Franciscus Ben.

Digitized by Google

Soc., 24 How. Pr. 216; Kennedy v. Local Union No. 726, 75 App. Div. 243; People v. Ben. Soc. of Operative Masons, 3 Hun, 361; Fay v. Supreme Tent, 38 Misc. Rep. 427. In determining the purposes of a corporation the charter will be strictly construed. The General Corporation Law (§ 10) provides: "No corporation shall possess or exercise any corporate powers not given by law or not necessary to the exercise of the powers so given." Oregon R. & N. Co. v. Oregonian R. Co., 130 U. S. 1; People v. Utica Ins. Co., 15 Johns. 358. The powers conferred on this corporation are to maintain a club for literary and social purposes. There is no mention in the certificate of incorporation of any political party or its principles. Nothing is said concerning the political character of its members. The provisions of the by-laws, for the violation of which the defendants contend the plaintiffs forfeited their rights, are contained in the preamble, whereby the members are pledged to support and uphold the principles and tactics of the political organization; in the obligation imposed upon each member not to belong to or support morally, financially or otherwise any other political party, and in the rules that any member expelled for treason to that political party shall not be reinstated under any circumstances; that under no circumstances or conditions shall the society withdraw its support from the said political party; that in case of any struggle, dispute or conspiracy taking place within the ranks of the society seven good standing members abiding by the constitution of the political organization shall be a sufficient number to constitute themselves the society and be in full control of the property of the society. The last two provisions, it is declared, shall not be altered, changed or amended. These provisions are not consistent with the literary and social purposes for which the corporation was organized. It may be that the corporation could refuse to admit any but members of a certain political party to its membership, but the corporation cannot be diverted by its by-laws from the objects for which it was incorporated and converted into an organization for other and different pursuits. Moreover,

Digitized by Google

it is unreasonable that a member should be subject to expulsion and deprived of his rights as a corporator because he does not hold a certain political faith, when the corporation was not formed for political purposes. In addition the object sought to be effected by these by-laws is contrary to section 1 of article 1 of the Constitution of the State, which provides: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." By-laws which compel the member of a corporation under penalty of expulsion to give up the free exercise of his rights of suffrage are in conflict with this article of the State Constitution. In People v. St. Franciscus Ben. Soc., 24 How. Pr. 216, it was held that the by-laws of a membership corporation requiring the members to receive certain religious rites was in conflict with article 1, section 3, of the State Constitution declaring: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind." Mr. Justice Marvin (at p. 221) says: "The defendant was organized and incorporated for charitable and benevolent purposes, under a statute of the State, and it is possessed of property and funds in which the relator has an interest, and the law protects that interest and he cannot be deprived of his rights by an unauthorized by-law, though he may have assented to it." So here the by-laws are unauthorized which restrict the untrammeled exercise of the right of franchise. It follows that the defendants did not become the body corporate in full control of its property and the plaintiffs have never ceased to be members of the corporation. It is urged by the defendants that the plaintiffs should have brought mandamus for reinstatement and that equity has no jurisdiction. When a member has been improperly expelled from a corporation mandamus is the appropriate form of action by which to obtain reinstatement. Matter of Haebler v. New York Prod. Exch., 149 N. Y. 414; People ex rel. Johnson v. New York Prod. Exch., id. 401; Matter of Weidenfeld, 84 App. Div.

Digitized by Google

235, 238; affd., 176 N. Y. 562. But in this case the plaintiffs have never been expelled. And where the defendants interfere with the plaintiffs in the exercise of their rights as members and officers of the corporation, exclude them from the rooms, prevent their attending meetings and voting, assume control of the corporation and divert its property, a suit in equity will lie. Fay v. Supreme Tent, 38 Misc. Rep. 427. In such case an action for damages against the individual defendants or a mere direction to recognize the plaintiffs as members would not restore them to the full enjoyment of their rights, and the Supreme Court will exercise its equitable powers and enjoin the defendants, declare their unauthorized acts void, compel the orderly and prescribed administration of the corporate affairs and prevent the diversion of the funds and property of the corporation to any other purpose than that for which the corporation was organized. In a suit for equitable relief the court will bring its relief down to the time of the trial and thus make an end of the litigation. Kilbourne v. Supervisors, 137 N. Y. 170, 178. It appearing that no duly authorized meeting of the corporation has been held since September 29, 1902, all subsequent proceedings are void. Judgment may be entered accordingly.

Judgment accordingly.

THE PEOPLE ex rel. MARGARET REYNOLDS, Relator, *v.* THE WARDEN OF CITY PRISON and JOHN B. MAYO, Magistrate, Respondents.

(Supreme Court, New York Special Term, June, 1904.)

Crimes — New York city — Disorderly conduct tending to a breach of the peace, under the Consolidation Act of 1882, § 1458, which is still in force in that city — Office of the writs of certiorari and habeas corpus — Prostitute — Punishment — Essentials of the magistrate's jurisdiction.

Neither a writ of *habeas corpus* nor one of *certiorari*, upon a commitment in the nature of a final judgment, acts as a writ of review or of appeal and under neither writ is the evidence to be reviewed

Digitized by Google

or errors committed on the trial corrected. The remedy to accomplish such a result is by appeal.

The Supreme Court is confined, upon these writs, to a consideration of the question whether the magistrate had jurisdiction of the offense, of the person and to pronounce the judgment imposed.

Sections 1458 and 1461 of the Consolidation Act of 1882 are still in force in the city of New York, and under the second subdivision of section 1458 declaring guilty of disorderly conduct that tends to a breach of the peace every common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passersby, a police magistrate of said city has jurisdiction summarily to convict the offender, and, under sections 707 and 711 of the revised charter of the city of New York (L. 1901, ch. 466), compel her forthwith to give surety for her good behavior and, upon her failure to do so, commit her to the city prison, for transfer to or detention in the workhouse, for a period not longer than six months.

All that is essential to the jurisdiction of the magistrate is that the offender be arraigned before him, be apprised of the nature of the offense, with which she is charged and for which she is to be tried, be offered an opportunity to defend and be then duly tried on that charge.

HABEAS corpus proceedings.

Cohen Brothers, for relator.

Wm. Travers Jerome, district attorney, for respondent.

CLARKE, J. To the writ of habeas corpus the warden has returned that he holds relator by virtue of a commitment of a city magistrate which recites that "Margaret Reynolds, who stands charged before me on oath of Nicholas P. Sussilo with having been, on the 4th day of June, 1904, at the city of New York, in the county of New York, guilty of such disorderly conduct as in my opinion tends to a breach of the peace and having been informed of her rights under the law, being thereof duly convicted before me upon competent testimony, she was ordered to find surety in the sum of $300 for her good behavior for the term of three months,

Digitized by Google

and having neglected forthwith to find surety these are to command you * * * to receive into your custody and safely keep in the said city prison, pending transfer to the workhouse, and you, the said superintendent, pursuant to the provisions of sections 707 and 711 of the Greater New York Charter, are required safely to keep the body of the said Margaret Reynolds until she shall find surety as aforesaid, or be thence delivered by due course of law. But such imprisonment shall not exceed the term of three months." To the writ of certiorari addressed to the magistrate has been returned the affidavit of said Nicholas P. Sussilo, of the 15th Precinct police, upon which she was held for trial, which sets forth "that Margaret Reynolds, now here, is a prostitute and nightwalker, and that she was on the night of the 4th day of June, 1904, in the city and county of New York, loitering in Fourth avenue, that being a public thoroughfare and public place, soliciting and importuning men passing in and along said thoroughfare or place for the purpose of prostitution, to the great annoyance of the people of the State of New York residing in the neighborhood, and passing thereby, and in violation of the statute in such case made and provided, and did then and there stop and solicit deponent for such purpose, at the hour of 9:10 o'clock P. M." Neither the writ of habeas corpus nor this writ of certiorari, upon a commitment in the nature of a final judgment, acts as a writ of review or appeal. Under neither writ is the evidence to be reviewed nor errors on the trial to be corrected. The proper way to accomplish such a result is by way of appeal. People ex rel. Taylor v. Forbes, 143 N. Y. 219; People ex rel. Bungart v. Wells, 57 App. Div. 140; People ex rel. Danziger v. P. E. House of Mercy, 128 N. Y. 180; all cited with approval in People ex rel. Smith v. Van de Carr, 86 App. Div. 9. On these writs we are confined to the consideration of whether the magistrate had jurisdiction of the offense of the person, and to pronounce the judgment imposed. The learned Appellate Division in the Second Department in People ex rel. Frank v. Davis, 80 App. Div. 448, held that sections 1458 and 1461 of the Consolidation

Digitized by Google

Act were still in force, providing that "Every person in said city and county shall be deemed guilty of disorderly conduct that tends to a breach of the peace, who shall in any thoroughfare or public place * * * commit any of the following offenses * * * (2) every common prostitute or nightwalker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passers-by," and that the magistrate could require the party against whom such conduct might be proved to give sufficient surety for his or her good behavior for any term not exceeding twelve months. That case also held that the offenses so enumerated did not reach the dignity of misdemeanors under the common law, and were properly within the jurisdiction of the magistrates; that it was competent for the Legislature to define such a minor offense and to give jurisdiction over it to the police magistrate, with the power of summary conviction, and that said magistrates had jurisdiction under section 707 *et seq.*, of the Greater New York Charter, to compel the giving of peace bonds and the imposing of fines not exceeding ten dollars on conviction. Consol. Act, §§ 1461, 1562. The same provisions were considered by the learned Appellate Division of this department in People ex rel. Smith v. Van de Carr, 86 App. Div. 9, which held: "It clearly appears, and is uncontroverted, that the city magistrates have jurisdiction over the offenses specified in this section, and the section (1458, Consol. Act) has been continued in force. * * * In the case at bar the magistrate had jurisdiction to try offenses designated as disorderly conduct, tending to a breach of the peace, under section 1458 of the Consolidation Act, and the warrant of commitment recites the jurisdictional facts, and the return to the writ of habeas corpus presenting the commitment was not traversed. It, therefore, appeared that the conviction was authorized, that warrant of commitment was duly issued, and that the relator was legally in the custody of the warden of the city prison." The case then goes on to consider the return to the writ of certiorari, which consisted of the deposition of the officer in all essential particulars similar to the case at bar. The court said: "All that was essential

Digitized by Google

to the jurisdiction of the magistrate is that the relator was arraigned before him and apprised of the nature of the offense with which he was charged and for which he was to be tried, and afforded an opportunity to defend, and was then duly tried thereon. Thus if we should treat the return to the writ of habeas corpus as traversed and the return to the writ of certiorari as the evidence adduced on the hearing thereon, still it appears that the magistrate had jurisdiction of the offense of the relator, had authority to try him and impose the sentence, and there was some evidence tending to show guilt, so that within all the authorities the writs should have been dismissed." I have taken the pains to quote at length from these controlling opinions in the hope that in calling them again to the attention of the bar the court may be relieved of much unnecessary work which has recently been put upon it in re-examining questions which seem to have been definitely settled. The court is required to issue the writ when prayed, but such proceedings ought not to be instituted when there are no merits. Writs dismissed and prisoner remanded.

Writs dismissed and prisoner remanded.

SIMON UHLFELDER, Plaintiff, *v.* THE PALATINE INS. CO., Limited, Defendant.

(Supreme Court, New York Trial Term, June, 1904.)

Fire insurance — Nature and construction of a clause in a policy making the loss payable to the mortgagee as his interest may appear.

A clause in a policy of fire insurance making the loss payable to the mortgagee as his interest may appear constitutes a separate insurance of his interest, under it the insurer undertakes that the capacity of the property to pay the mortgage debt shall not be diminished and that, if it is diminished by fire, the insurer will pay him the loss, and this although the property in its damaged condition may be more than sufficient to pay the mortgage debt.

In order to recover under the clause the mortgagee must prove that his security or interest was damaged.

Digitized by Google

ACTION upon a policy of fire insurance. Jury waived.

Rose & Putzel, for plaintiff.

Butler, Notman, Joline & Mynderse, for defendant.

DAVIS, J. In January, 1901, one William Reichert bought from the plaintiff, Uhlfelder, the premises No. 319 East Seventieth street, subject to a first mortgage of $12,000, held by the New York Savings Bank, giving at the time a purchase-money mortgage of $5,000. In July, 1901, the plaintiff parted with a one-third interest in this second mortgage to Emma Weinberg. Reichert having defaulted in the payment of interest on the second mortgage, foreclosure proceedings were begun in July, 1902. These proceedings resulted in a sale by a referee at public auction on the 16th of February, 1903; Uhlfelder being the highest bidder became the purchaser. The net proceeds of the sale over and above the prior liens were $2,549.56. Two-thirds of this amount were credited to the plaintiff on his purchase and one-third to Weinberg. Soon after the sale Uhlfelder assigned a one-third interest in his bid to Abraham Weinberg, another one-third to Isaac Heilbrun, and retained one-third for himself. The referee's deed was made to these three persons and was dated March 16, 1903. It was delivered and recorded some time in June, 1903. The referee's report of sale was filed July 9, 1903. The premises in question were insured under a policy issued by defendant to Reichert, the owner, for a term of three years from March 5, 1900, to March 5, 1903, at twelve o'clock noon. A fire occurred on March 5, 1903, a few hours before the policy expired, and caused a damage of $2,900 to the building. The policy contained the usual New York standard mortgagee clause, under which the loss or damage is made payable to the mortgagee as interest may appear. Accordingly the plaintiff brought this action to recover the amount of the damage, $2,900, basing his right to recover upon the mortgagee clause. It has been held that such a clause "makes an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the

Digitized by Google

company free from the conditions imposed upon the owners." Eddy v. London Assur. Corp., 143 N. Y. 311, 322. Under the mortgagee clause the company undertakes that the capacity of the property to pay the mortgage debt shall not be diminished, and that if it is diminished by fire, it will pay over the loss to the mortgagee, irrespective of the fact that the property in its damaged condition may be more than sufficient to pay the mortgage debt. Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 359. As was said in the case of Hastings v. Westchester Fire Ins. Co., 73 N. Y. 146: "It was the evident purpose of both parties to secure the plaintiffs as mortgagees against any loss by reason of a destruction of the buildings situated upon the mortgaged premises." It is a peculiar circumstance of this case that the fire occurred after the sale under foreclosure, but before the delivery of the deed. However, the title finally passed from the owner to the purchaser, the plaintiff herein, and for the consideration bid at the sale. It thus appears that the fire really caused no loss to the mortgagee's interest. The capacity of the mortgaged property to pay the mortgagee's debt in no wise was diminished by the fire, and the plaintiff availed himself of that capacity to its fullest extent by proceeding to sale under foreclosure before the happening of the fire, the sale having been completed by the delivery of the deed. Doubtless, if as purchaser at the foreclosure sale he had thereafter refused to take title because of the damage by fire and the sale had been set aside on that account, the plaintiff as mortgagee could recover because of the damage to his security, as the foreclosure judgment of itself would not destroy his right to recover the amount of the damage under the mortgagee clause. The fire having happened after the sale, the plaintiff as purchaser could have refused to complete the purchase and enforced his right as mortgagee to recover from the company the loss to the extent of his mortgage, with the right of subrogation in the company; or, he might have protected himself against loss by insuring his interest as purchaser immediately after the foreclosure sale. But here the sale went through and the deed was delivered, notwithstand-

Digitized by Google

ing the fire, and with no damage to the mortgagee's security and no lessening of the purchase price; and as it is damage to mortgagee's security against which the defendant insured, I think the defendant is entitled to judgment dismissing the complaint, with costs.

Complaint dismissed, with costs.

GUSTAVE E. KISSEL and SUSAN RAUMER, Plaintiffs, *v.* THE CHICAGO & EASTERN ILLINOIS RAILROAD CO. et al., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Simple contract not negotiable — Railway traffic agreement collateral to mortgage securing bond issue — Innocent purchasers of bonds take subject to equities — Injunction on issue of bonds when unnecessary to keep open the question of the validity of the mortgage.

On a motion to continue an injunction *pendente lite* obtained by the plaintiffs, stockholders of the Eastern Illinois Co., to restrain the defendant railroad companies from issuing a series of bonds and notes secured by a mortgage covering among other things a traffic agreement made between the defendants, it appeared that the defendant, the San Francisco Co., had acquired absolute and voting control of the defendant, the Southeastern Co., running between the San Francisco Co. and the Eastern Illinois lines, with earnings not meeting fixed charges and a bonded indebtedness of $15,000,000, that the San Francisco Co. had also acquired absolute and voting control of the defendant, the Eastern Illinois Co., a profitable road, paying six per cent dividends and accumulating a surplus, by procuring a large amount of its common stock to be deposited with a trustee — which in return issued to depositing stockholders stock trust certificates — under a written agreement made with the trustee by the San Francisco Co. that it would, on or before July 1, 1942, or, at its option, on any earlier dividend day, pay registered holders of the certificates the sum of $250 for each share of stock represented by the certificates and semi-annual dividends at the rate of ten per cent on the par value of the shares, that thereafter the traffic agreement was executed between the San Francisco Co. and the Eastern Illinois Co., on the one part, and the Southeastern

Digitized by Google

Co. on the other part, whereby the latter bound itself to deliver to the former companies respectively all traffic transported over its lines and destined to any point on theirs, while, on the other hand, the San Francisco Co. and the Eastern Illinois Co. jointly bound themselves collectively to interchange, with the lines of the Southeastern Co., a sufficient amount of traffic, during the term of the agreement, to produce to the Southeastern Co., taken with its local traffic, an aggregate semi-annual net revenue of not less than $485,000, being the precise amount necessary to pay the interest under the refunding scheme proposed. The plaintiffs, the trustee having refused to act, sue in their own names charging the traffic agreement to be in reality a disguised mortgage imposed, without authority or real or adequate consideration, upon their profitable Eastern Illinois property in order to make use of its credit to float the $16,000,000 worth of bonds issued upon the property of the unprofitable Southeastern Co. It further appeared that before issue of the injunction $15,000,000 worth of the bonds had been certified, and that about half of them had been delivered by the trustee to the parties entitled and the other half passed to their credit.

Held, that within the rule, which was applicable to the traffic agreement, that the purchaser of a chose in action takes the interest purchased subject to all defenses, legal and equitable, of the debtor who issued the security, innocent purchasers of the bonds would be in no better position to enforce the traffic agreement against the Eastern Illinois Co. than would the Southeastern Co., through whom they would derive their right, that company having included the traffic agreement in the mortgage given to secure the bonds, that, therefore, the claim of the plaintiffs that they would suffer irreparable injury if the bonds passed into the hands of purchasers for value and without notice, was untenable and that the plaintiffs had no right on that ground to the injunction, restraining issue of the bonds, or to its continuance.

MOTION to continue an injunction *pendente lite*.

Winthrop & Stimson (Elihu Root, Austen G. Fox and Henry L. Stimson, of counsel) for plaintiffs and motion.

Butler, Notman, Joline & Mynderse (Will Hartwell Lyford and Adrian H. Joline, of counsel), for defendants the Chicago & Eastern Illinois R. Co., St. Louis & San Francisco R. Co. and St. Louis, Memphis & Southeastern R. R. Co.

Digitized by Google

Hornblower, Byrne, Miller & Potter (James Byrne, of counsel), for defendant New York Security & Trust Co.

Sheehan & Collin (John L. Wells, of counsel), for defendant Colonial Trust Co., opposed.

GIEGERICH, J. This is a motion to continue an injunction *pendente lite* restraining the issuance of a series of bonds and notes secured by a mortgage covering, among other things, a traffic agreement made between the railroad companies, defendants, and also to restrain the payment of certain moneys under such traffic agreement. The facts, so far as material, are as follows: The defendant the St. Louis & San Francisco Railroad Company (hereinafter called the San Francisco company) is engaged in consolidating and building up an extensive railroad system by acquiring control of and grouping together various lines and systems previously operating independently and under boards of directors selected by their respective stockholders. One of the railroads thus acquired is the defendant the Chicago & Eastern Illinois Company (hereinafter called the Eastern Illinois company), which for a number of years prior to the consolidation in 1902 had been operated at a profit, the dividends paid in the years 1901 and 1902 having amounted to six per cent. per annum, besides which a surplus was accumulated, the net earnings during the year 1902 having amounted to more than ten per cent. on the common stock after the payment of all prior charges. Another company thus acquired was the defendant the St. Louis, Memphis & Southeastern Railroad Company (hereinafter called the Southeastern company), which was not so old or successful as the Eastern Illinois company, and whose credit was not established and whose earnings thus far have been insufficient to meet the fixed charges, the bonded indebtedness on the different portions of the system aggregating nearly $15,000,000. The stock of this company was acquired by the San Francisco company by the issuance of the latter's collateral trust gold notes in the aggregate amount of $4,000,000, which notes are still outstanding. There has also been more than $3,500,000 expended by the San Francisco company in the con-

Digitized by Google

struction and completion of the lines of the Southeastern company since its acquisition by the former. The terms under which the San Francisco company obtained control of the Eastern Illinois are, concisely stated, as follows: A very large amount of the common stock was acquired by the San Francisco company and was deposited by it with the Colonial Trust Company, as trustee, under a trust agreement entered into between said trust company, and the San Francisco company, the various stockholders who thus parted with their stock to the latter receiving back from the trust company stock trust certificates. Under this trust agreement, the San Francisco company was to pay to the registered holders of the trust certificates on the 1st day of July, 1942, or at its option on any earlier dividend day, the sum of $250 for each share of stock represented by the certificates, and was also to pay semi-annual dividends at the rate of ten per cent. on the par value of the shares. It was also provided in the trust agreement that if the San Francisco company failed to pay such dividends promptly, or if it defaulted in other respects therein specified, the registered holder of the trust certificates might surrender the same and should receive back in exchange his certificates of stock. In the meantime the San Francisco company was to have the power of voting upon all stock held by the trust company for the election of directors and for every other purpose not contrary to the covenants or guarantees on its part particularly set forth in the instrument, and also to receive all dividends declared on the stock so deposited. Since the consummation of this agreement the San Francisco company has elected the directors and officers of the Eastern Illinois company, more than a majority of such directors having been continuously persons who were also directors of the San Francisco company, as it has similarly selected the officers and directors of the Southeastern company formerly referred to, and neither the Eastern Illinois nor the Southeastern company has any separate or independent action as distinct from the San Francisco company. Such being the situation on or about April 14, 1904, an instrument called a traffic agreement (being the contract complained of) was executed between the San

Digitized by Google

Francisco and Eastern Illinois companies on the one part and the Southeastern company on the other whereby the Southeastern company, whose lines are intermediate those of the other two, bound itself to deliver to them respectively all traffic transported over any of its lines and destined to any point upon either of their lines, such deliveries to be made "at the most convenient junction points" between the said railroads. On the other hand, the San Francisco and the Eastern Illinois companies bound themselves jointly to collectively interchange with the lines of the Southeastern company a sufficient amount of traffic during the term of the agreement to produce, taken with the local and other traffic of the Southeastern company, an aggregate semi-annual net revenue to the latter of not less than $485,000 over and above all expenses of maintenance, operation, repairs, renewals and taxes, being the precise amount necessary to pay the interest under the refunding scheme proposed. The plaintiffs complain of this traffic agreement and charge that it it not, in fact, what it purports to be, but is in reality a disguised mortgage upon the Eastern Illinois property, imposed without authority, or real or adequate consideration and without regard to the interests of that company, but for the purpose of making use of the credit of its established and dividend-earning railroad in order to float the $16,000,000 bond issue above mentioned upon the property of the heretofore unprofitable Southeastern system. It is urged by them that as stockholders, the Colonial Trust Company, as trustee, having refused to act, they are entitled to maintain the suit in their own right and name. Many interesting and important questions are pressed upon my attention by the distinguished counsel on either side, such as what the real relation of the parties is under such circumstances, whether the holders of the stock trust certificates are to be deemed the owners of the stock until it is paid for, or whether the San Francisco company is the owner and the holders of the stock receipts are only creditors; also various questions as to the construction of the several covenants and provisions in the trust agreement. Likewise questions of fact as to whether the traffic agreement is a prudent and beneficial one for the

Digitized by Google

Eastern Illinois company, or whether it is an improvident, if not a fraudulent one. In the view I take of the case, however, it is unnecessary to consider more than the single question, whether innocent purchasers for value of the bonds will be in any better position to enforce this traffic agreement against the Eastern Illinois system than would the original party to the agreement, the Southeastern company, through whom they would derive their right, that company having included this traffic agreement with other assets under the mortgage given to secure these bonds. The well-established rule of law in the case of a chose in action is that the purchaser acquires no greater right than his vendor had. In Bush v. Lathrop, 22 N. Y. 535, 538, the Court of Appeals said: "All the cases agree that the purchaser of a chose in action takes the interest purchased, subject to all the defenses, legal and equitable, of the debtor who issued the security," quoting Lord Thurlow in Davies v. Austin, 1 Ves. 247, that " a purchaser of a chose in action must always abide by the case of the person from whom he buys." This rule as laid down in Bush v. Lathrop, *supra,* was said in Fairbanks v. Sargent, 104 N. Y. 108, to stand in full force and unquestioned, except to the extent that where the real owner has by the act of investing another with apparent ownership of the property estopped himself from disputing such title, the rule does not apply. The learned counsel for the plaintiffs argue that if the doctrine of Crocker v. Crocker, 31 N. Y. 507; Leitch v. Wells, 48 id. 585, and Weaver v. Barden, 49 id. 286, which related to stock corporations or securities, should be held to apply to choses in action like a contract, as here the traffic agreement, the plaintiffs would suffer irreparable injury, if these bonds should be suffered to pass into the hands of innocent purchasers. A sufficient reply to this argument is that the courts have not shown any tendency to thus extend the doctrine of the authorities last mentioned, but, on the contrary, to reassert the original rule. See Central Trust Co. v. West India Imp. Co., 169 N. Y. 314, 324, and cases cited. The cases cited by the learned counsel for the plaintiffs dealt, as before said, with stock or securities and not with contracts of the ordinary character. Further-

Digitized by Google

more, an examination of those cases will show that the plaintiffs were estopped by reason of their having by their own act conferred apparent title on others. In the case in hand, so far from being guilty of any act which could be construed as an estoppel, the plaintiffs have shown the utmost diligence and energy in attacking the contract in question, and no one hereafter, whether a bondholder or other, will have good ground for complaining in this respect of anything that the plaintiffs have done or left undone. Unless the rule of Bush v. Lathrop is held applicable to such a case as is here presented, it is difficult to conceive a case to which it would apply. Where a going concern mortgages all its assets, including outstanding contracts, if the mortgagee or the owners of bonds secured by the mortgage should be held to have any greater or different rights than the concern itself upon such contracts, intolerable confusion and injustice would result. Moreover, bonds aggregating upward of $15,000,000 worth of the entire issue of $16,000,000 have already been certified, and about half of them delivered by the trustee to the parties entitled thereto, and the other half passed to the credit of such parties prior to the issuance of the injunction. Under all these circumstances, I think it is plain that the branch of the injunction which relates to the issuance of the bonds should not be continued. That the injunction, so far as it relates to the notes, should be dissolved is, as I understand the matter, practically conceded, since the argument, as the trust agreement by which they are secured does not refer to the traffic agreement. So far as the other portion of the injunction order is concerned, namely, that which restrains the Eastern Illinois company from paying out any moneys of that company on account of the guaranty of net income of the Southeastern company, it does not appear by the terms of the agreement objected to or otherwise that any such moneys will be paid out until after the action can be tried and determined in its regular order. The motion to continue the injunction is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

Digitized by Google

MARY K. SWAN, Plaintiff, *v.* WILLIAM J. SWAN, Defendant.

(Supreme Court, New York Special Term, June, 1904.)

Bill of particulars — Not exactible by the plaintiff where the defendant pleads payment — Meaning of "claim," in the last clause of Code Civ. Pro., § 531 — When a defense presents no question of the amount and an order for a bill should be refused.

Where a defendant interposes to a complaint, stating two causes of action for moneys alleged to have been advanced, paid out and loaned by the plaintiff to the defendant, first, a general denial, and, as a second defense to both causes of action, payment, the plaintiff is not entitled to a bill of particulars of the payment.

One construction of the word "claim," used in the concluding clause of Code Civ. Pro., § 531, authorizing the court to make an order directing "a bill of the particulars of the claim of either party to be delivered to the adverse party," in the case of a defendant, is the position he takes in his pleading as the reason why judgment should not go against him.

A third defense interposed in the action, which was brought by a wife against her husband, alleging that the moneys covered by her first two causes of action were advanced, etc., by her under an ante-nuptial agreement made between the parties, to the effect that, after marriage, she would contribute her income, and he his earnings (whatever they might be) to support the family, and that he had fully performed this agreement upon his part by contributing his earnings, while adding strength to the answer and constituting a claim, does not entitle the plaintiff to an order for a bill of particulars of this defense and this because no question of amount is presented by the defendant's allegations in the defense that he had contributed his earnings.

MOTION for a further bill of particulars.

Edward S. Clinch, for motion.

Edward S. Hull, opposed.

GIEGERICH, J. In this action, brought by a wife against her husband for a money judgment, three causes of action

Digitized by Google

are set up in the complaint: *First,* for the sum of $3,875.69 for moneys advanced and paid out for the defendant's account; *second,* for the sum of $953 for moneys loaned to the defendant, and *third,* for $1,000, being the value of a bond loaned by the plaintiff to the defendant and not returned by him. The answer first sets up a general denial, and as a second defense to the first and second causes of action, pleads payment, and, as a third defense to the same causes of action, alleges that both plaintiff and defendant had been previously married, the plaintiff having two children and the defendant one, and that the plaintiff and her children had large means, while the defendant had no property of value and only a small income obtained from his earnings, and that, under such circumstances, the parties entered into an antenuptial agreement that the plaintiff would contribute her income in addition to the earnings of the defendant toward the support and maintenance of the plaintiff and the defendant and their respective children and the education of the children. This defense further alleges that since the time of the marriage the defendant has contributed large sums toward the support and maintenance of the parties and their children as aforesaid, amounting in the aggregate to over $5,000, which sum was all that the defendant was able to contribute during the said time, outside his incidental and business expenses. In response to the plaintiff's demand the defendant has heretofore served a bill of particulars, as follows: "To rent of apartment, $1,250; to household expenses, $2,075.18; paid to plaintiff for personal account, $928.75; paid to plaintiff for personal expenses and incidentals, etc., as per vouchers, $3,221.65; to cash paid to plaintiff, no vouchers (estimated), $2,000; total, $9,475.59." As a matter of fact the attached itemized statement is a single list of many pages in length, and the only way in which it can be determined under which of the above headings such as "rent," "household expenses," "personal account," etc., the various items fall, or are intended to be placed, is by the description of the item contained in itself, such as "rent," "cash," "telephone," etc. Many of the items, however, do not bear upon their face anything which would show under which of the various headings

Digitized by Google

they are intended to fall, and the plaintiff in her moving affidavit swears that she cannot pick out the items claimed to aggregate the amounts above mentioned, with the exception of the amount of rent. The defendant resists the motion on the ground that no bill of particulars whatever can be exacted in a case of this kind, because a defendant is not required to furnish a bill of particulars of payments made under the defense of payment, citing Barone v. O'Leary, 44 App. Div. 418, which authority supports his contention. The only remaining question is whether the third defense above outlined is of such a character as to warrant a bill of particulars. In Goddard v. Pardee Medicine Co., 52 Hun, 85, the court, in the prevailing opinion, said: "The fourth defense in the answer is not affirmative in its character. It really amounts to nothing more than a denial of the plaintiff's alleged cause of action. It adds no strength to the answer, and could be wholly stricken out without detriment to the rights of the defendant. Considering it, therefore, with reference to its legal effect, which is simply that of a denial, it cannot properly be regarded as setting up any such claim as to render it proper to require a bill of particulars." The present case is clearly distinguishable from that one, as it does add strength to the answer and could not be wholly stricken out without detriment to the rights of the defendant, and answers the description laid down in Dwight v. Germania Life Ins. Co., 84 N. Y. 493, 504, of the tests which determine whether the claim is of such a character that a bill of particulars may be ordered, in which case it was said: "In our view the claim spoken of by that section, (meaning section 531 of the Code of Civil Procedure), where the case of a defendant is in hand, is whatever is set up by him as a reason why the action may not be maintained against him. The claim of the defendant, is that ground of fact which he alleges in his answer as the reason why judgment should not go against him. His claim, in the case, is the position he takes in his pleading, based upon the facts he sets up, and the law applied thereto, why he should go without day." But while the defense in question answers in its general character the requirements of the above description,

Digitized by Google

it nevertheless lacks certain other elements necessary to warrant the ordering of a bill of particulars. Both sides have assumed that there was a question of amount presented by this defense, but such is not the fact. To be sure, the sum of $5,000 is mentioned, but this is incidental only, the essence of the defense being that the moneys mentioned in the first two causes of action were advanced or paid by the plaintiff in accordance with the terms of an agreement which the defendant has fully performed on his part, such performance depending, not upon his contributing $5,000 or any other definite sum, but his "earnings," whatever they might be. This confusion may have arisen from the form of the bill of particulars voluntarily served by the defendant, which presents certain categories not based upon anything contained in the pleadings, and which, therefore, present false issues. The motion for a further bill of particulars should, therefore, be denied, but without costs.

Motion denied, without costs.

EDWIN W. GLASCOE and MARGARET M. GLASCOE, Plaintiffs, *v.* MARY HATCH WILLARD, Defendant.

(Supreme Court, New York Special Term, June, 1904.)

Temporary injunction — The right thereto is dependent on the nature of the action and the complaint must state the facts which give the right.

The right to a temporary injunction depends on the nature of the action and the complaint must state the facts entitling the plaintiffs to the injunction.

The defect cannot be supplied by affidavit.

A complaint which alleges that the defendant, without the consent of the plaintiffs, landlords of the building demised, caused to be made a cut or opening in the west basement hall and that unless the defendant is restrained from using the cut or opening great and irreparable damage will be sustained by the plaintiffs, does not, without more, state a cause of action, and a temporary injunction theretofore granted the plaintiffs, restraining the defendant from using the cut or opening, should not be continued.

Digitized by Google

MOTION to continue an injunction *pendente lite.*

John G. Ritter, for plaintiffs and motion.

Harrison Clark, Jr., for defendant, opposed.

GIEGERICH, J. This is an application to continue an injunction *pendente lite* restraining the defendant from using a cut or opening, which it is alleged she caused to be made in the west basement hall of the demised building, without the permission of the plaintiffs, the landlords thereof. Since the right to the injunction depends upon the nature of the action, the facts entitling the plaintiffs to it must be averred in the complaint. McHenry v. Jewett, 90 N. Y. 58. The complaint in the action merely alleges "that unless this defendant is restrained great and irreparable damages will be sustained by the plaintiffs." No facts are stated showing the nature of the damages which the plaintiffs may sustain unless the defendant is restrained, or why they will be irreparable, and, therefore, under the authorities, the complaint is clearly insufficient to entitle the plaintiffs to relief by injunction. In McHenry v. Jewett, *supra*, the court (at p. 62) said: "So also it is alleged that it is greatly against the plaintiff's interest as a shareholder, to permit the defendant to vote upon the shares, and that the plaintiff will suffer great and irreparable injury, if the defendant is permitted to do so. But no facts justifying these conclusions are stated, and the mere allegation of serious or irreparable injury, apprehended or threatened, not supported by facts or circumstances tending to justify it, is clearly insufficient." In Brass v. Rathbone, 153 N. Y. 435, it was sought to restrain water commissioners from shutting off the water from the premises owned by the plaintiff. The complaint merely alleged that great and irreparable damage was apprehended and threatened, but the statement was not supported by facts and circumstances tending to justify an inference that any damage would be suffered. The court, in holding that the complaint did not show that the plaintiffs were entitled to

Digitized by Google

relief by injunction, said (p. 442): "The plaintiffs obviously seek to maintain this suit upon the ground that the threatened acts of the defendants would produce irreparable injury to them and their property. The only allegation in their complaint, however, is that the discontinuance of the supply of water to their premises would work a great hardship to the tenant and produce great and irreparable injury to the plaintiffs. But no facts are stated in the complaint justifying that conclusion. The mere allegation of great or irreparable injury apprehended or threatened, which is not supported by facts or circumstances tending to justify it, is clearly insufficient. Therefore, the complaint does not show that the plaintiffs were entitled to relief by injunction." McHenry v. Jewett, 90 N. Y. 58, 62. The defect referred to cannot be remedied by affidavit. As was said by the court in Heine v. Rohner, 29 App. Div. 239, 242: "But it is to be observed that the question of the right to an injunction of this character depends upon the allegations of the complaint, and that unless it appears from the complaint that the plaintiff is entitled to the judgment of injunction, it cannot issue. Code Civ. Pro., § 603. It may all be very true that evidence may be offered in the shape of affidavits to support the allegations of the complaint, but where the complaint itself shows no cause of action or right to relief, such right cannot be established by affidavit." It results from these views that the motion must be denied, with ten dollars costs to the defendant to abide the event, with leave, however, to the plaintiffs to renew the application upon new papers.

Motion denied, with ten dollars costs to abide event, with leave to plaintiffs to renew application upon new papers.

Digitized by Google

Matter of the Assignment of MICHAEL MERKLEN et al., to HENRY G. SCHRENKEISEN.

(Supreme Court, New York Special Term, June, 1904.)

Assignment for benefit of creditors — Power of the Supreme Court to punish the assignee for contempt in disobeying a decree for the payment of money.

The Supreme Court has concurrent jurisdiction with the County Court to exercise the power, conferred by L. 1894, ch. 134, of punishing for a contempt of court an assignee for the benefit of creditors who willfully neglects to obey a final decree for the payment of money, with a certified copy of which decree he has been previously personally served.

MOTION to vacate and set aside an order adjudging an assignee for the benefit of creditors guilty of contempt.

Kneeland, La Fetra & Glazo (Stillman F. Kneeland, of counsel), for motion.

Francis A. Dugro (John P. Herren, of counsel), opposed.

GIEGERICH, J. The single question presented upon this motion concerns the jurisdiction of the court to make the order complained of. The facts, briefly stated, are that the assignee for the benefit of creditors failed to pay a dividend of several hundred dollars, as directed in the final decree entered after his account had been taken and stated before a referee. Upon the application of the aggrieved party, an order was made adjudging the assignee guilty of contempt in having disobeyed the provisions of the said final decree which directed him to make the payment referred to, among others, and fining him the amount of such dividend and committing him to jail until such payment be made, where he is still in custody. The jurisdiction of the court to make the order is attacked upon the authority of Harris v. Elliott, 163 N. Y. 269, decided upon the general provisions of the Code of Civil Procedure, and Myers v. Becker, 95 N. Y. 486, decided under the analogous provisions of the Revised Statutes. It is unnecessary to consider what effect the cases cited

Digitized by Google

would have upon the present question if its decision depended upon general provisions of law. But it is controlled by a specific enactment contained in section 22 of the General Assignment Act, being chapter 466 of the Laws of 1877, as such section was amended by chapter 134 of the Laws of 1894, which amendment expressly declares "that a final decree, directing the payment of money, may be enforced by serving a certified copy thereof personally upon the assignee for the benefit of creditors, and if said assignee willfully neglects to obey said decree, by punishing him for a contempt of court." To be sure the various powers under the General Assignment Act, including those in section 22, are in terms conferred upon County Courts, but early in the history of the act, to wit, in chapter 380 of the Laws of 1885, the Supreme Court was given full concurrent jurisdiction with the County Courts. Moreover, by section 24 of the original act, all the powers of a county judge under the act were, within the city and county of New York, conferred upon judges of the Court of Common Pleas, and that court was given full jurisdiction in relation to assigned estates. Upon the consolidation of the courts by the new Constitution, the jurisdiction theretofore exercised by the Court of Common Pleas was expressly vested in the Supreme Court. Const., art. VI, § 5. Upon all this I think it should be held that the Supreme Court, as well as the County Courts, possesses the new power conferred by the amendment of 1894. It is also claimed that the papers on which the commitment was made are defective in failing to show that the title to the claim which was originally vested in the Union Square Bank ever passed to the Corn Exchange Bank, on whose behalf the order of commitment was obtained. It may be that there is some lack of definiteness in the original papers upon the point of such transference of title, but this defect is cured by the affidavit on which the order to show cause to vacate was obtained, which affidavit states explicitly that the Union Square Bank assigned its interest in the sum in question to the Corn Exchange Bank. The motion should, therefore, be denied, but without costs.

Motion denied, without costs.

Digitized by Google

ALBERT SANDERS, as Trustee, Etc., Plaintiff, *v.* THE PEOPLE'S CO-OPERATIVE ICE CO. et al., Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Calendar practice — When a case was not at issue when the plaintiff served a notice of trial — Service by publication.

A defendant served by publication may, before the service is completed, appear and demand a copy of the complaint, if one has not been delivered to him personally, notwithstanding one was served on him by mail, and his time to answer runs from the time of the service of the complaint in compliance with such demand.

Where service of the complaint is made after service of notice of trial by the plaintiff, the case is not at issue, the service of the notice is unauthorized and the case, where the plaintiff has put it on the calendar, must be stricken therefrom on the defendant's motion.

MOTION to strike cause from calender and cross-motion for a preference.

Truax, Watson & Roberts, for plaintiff.

Frederick A. Gill, for defendants.

GILDERSLEEVE, J. The defendant Rich was served with process by publication, and a copy of the summons and complaint was mailed to him at his residence in Baltimore, on or about February 29, 1904. The service of the summons by publication and mailing was completed on April 23, 1904. The day previous, i. e., on April 22, 1904, the defendant served notice of appearance and demand of a copy of the complaint. On May 23, 1904, plaintiff served notice of trial and motion for a preference, and on May 26, 1904, a copy of the complaint was served on defendants' attorney. The latter moves to strike the cause from the calendar on the ground that it was not at issue at the time of the service of the notice of trial, and that said notice was absolutely void and of no effect. The plaintiff claims that the mailing of the complaint constituted a service of the same, and the subse-

Digitized by Google

quent personal service on the defendants' attorney was unnecessary, and that, in any view, the defendant waived the objection by not returning the notice of trial. A defendant served by publication may, before the service is completed, appear and demand a copy of the complaint, if one has not been delivered to him personally, notwithstanding one was served on him by mail; and his time to answer runs from the time of the service of the copy complaint in compliance with such demand, unless otherwise fixed by stipulation. Van Zandt v. Van Zandt, 23 Abb. N. C. 328, O'Brien, J. The defendant's time to answer, therefore, did not commence to run until the personal service of the complaint on May 26, 1904, three days after the service of the notice of trial. When the plaintiff attempted to serve his notice of trial, this cause was not at issue, and such service was unauthorized by the provisions of the statute. Wallace v. Syracuse, B. & N. Y. R. R. Co., 27 App. Div. 459. While it is true that a mere irregularity can be waived by the retention of the defective paper, that rule does not apply here, for the reason that the notice was not only irregular, but absolutely void. At the time of the service of such notice there was no issue between plaintiff and defendant Rich to be noticed for trial, and the notice had no more force or effect than if service thereof had not been made or attempted. Wallace v. R. R. Co., *supra*. The objection of the defendant, under the circumstances, seems somewhat technical, and it operates as a hardship upon the plaintiff, but I see no other way than to grant the motion to strike the cause from the calendar. The other motion for a preference must necessarily be denied.

Motion to strike cause from the calendar granted, and motion for a preference denied.

Digitized by Google

THE WESTMINSTER PRESBYTERIAN CHURCH OF WEST TWENTY-THIRD STREET, JOHN E. HEARTT, HOMER LEE, and JOHN H. DE LAMATER, Plaintiffs, *v.* WALTER FINDLEY and JAMES JOHNSTON, Defendants.

(Supreme Court, New York Special Term, June, 1904.)

Religious corporation — When the court will interfere in matters ecclesiastical — When the right to protect the temporalities of a Presbyterian church, which is subject to L. 1902, ch. 97, subds. 6 and 7, from the alleged unlawful control of persons no longer entitled to act as trustees, vests in the remaining trustees and not in those having the spiritual control of the church.

The general rule as to the right of civil courts to interfere in ecclesiastical matters is that the right exists only where there are conflicting claims as to church property or funds, or their use, or where civil rights are involved.

The ruling elders and members of the session of a Presbyterian church, the temporalities of which are managed by trustees elected by those qualified to vote (L. 1902, ch. 97, § 4, subds. 6 and 7) cannot maintain, in their own names and in that of the corporation, an action to enjoin certain defendant trustees of the church from acting as such upon the ground that they have been suspended by the session as communicants for contumacy of the session, where there are other trustees and the complaint, and affidavits on a motion for an injunction, do not show that the other trustees have refused to act, for, if it be assumed that the action of the session disqualified the defendants from continuing to serve as trustees, it is the implied duty of the remaining trustees, in order to prevent any diversion of the corporate property, to see to it that no disqualified person shall act with them in regard to it.

MOTION by a committee of a session of a Presbyterian church to enjoin the defendants and each of them from acting as trustees of the church on the ground that they had been suspended by the session as communicants for contumacy of the session.

The plaintiffs secured a temporary injunction with an order to show cause why it should not be continued, *pendente*

Digitized by Google

lite. The plaintiffs allege that the defendants had been removed as trustees by virtue of proceedings in the church court, and that their appeals from such judgment had been dismissed by the appellate-ecclesiastical court. The affidavits in reply showed by the certificate of this appellate-ecclesiastical court that, while dismissing the appeals, this court held the action of the session, so far as it related to the defendants' office as trustees, to be a nullity.

Louis F. Doyle, for plaintiffs.

Henry W. Jessup, for defendants.

GREENBAUM, J. It appears in this case that the temporalities of the church, as distinguished from its spiritual control, are managed by a board of trustees elected from those qualified to vote in accordance with the provisions of law (chap. 97, Laws of 1902, subd. 6, § 40), and that said trustees are the trustees of the corporation (subd. 7). It is the implied duty of the trustees to prevent any diversion of the property of the corporation, and, therefore, to see to it that no one shall act with them as trustee who may have become disqualified, or who has no legal right to act in conjunction with them in the control of the temporalities of the corporation. The majority of the trustees may sue in the name of the corporation to prevent any illegal interference with the property of the corporation, and if the trustees are in hostility to its interests or refuse to take proper action looking to the legal protection of its rights, "any private member of the corporation might bring suit for the benefit of himself and the other members, but in such case it would be necessary to sue in his own name, and make the trustees and the corporation defendants." First Reformed Presbyterian Church v. Bowden, 14 Abb. N. C. 356, 361. "The right of civil courts to interfere in ecclesiastical matters is considerably limited. The general rule is that such right exists only where there are conflicting claims to church property or funds or the

Digitized by Google

use of them, or where civil rights are involved." Rector of St. James' Church v. Huntington, 82 Hun, 125, 131. The unfortunate differences existing between the defendants and the session, who constitute the spiritual head of the corporation, cannot be the subject of judicial review in this action. Assuming that the judgment rendered by the session against the defendants operates to disqualify them as voting members, and, therefore, from continuing as trustees while under the ban of the session, although previously legally elected as trustees, then it would seem to be the duty of the remaining trustees to protect the temporalities of the church by taking such action as would protect the corporation from the unlawful control of persons who are no longer entitled to act as trustees. There is no allegation in the complaint or in the moving affidavits that the other trustees have refused to act in the premises, and it affirmatively appears that this action is brought by the ruling elders and members of the session in their name and that of the corporation. Under the circumstances it is evident that the session has no legal power to institute this action in the name of the corporation or in their own name, and the court cannot consider the legal status of the defendants in respect of said corporation. It follows that the injunction must be denied.

Injunction denied.

Digitized by Google

Matter of the Final Judicial Settlement of the Account of JOHN F. HALSTEAD, as Surviving Trustee under the Will of CHARLES J. BUCKINGHAM, Deceased.

(Surrogate's Court, Dutchess County, June, 1904.)

Surviving trustee — Liability for the devastavits of his deceased co-trustee — When permitting securities of the corpus to remain of the same negotiable character as they were at the testator's death and purchasing others without requiring them to run or be registered in the names of both trustees is not negligence in the surviving trustee — When his giving each trustee, instead of both jointly, access to a fund in a safe deposit vault, is not negligence — When his turning over unregistered railroad bonds, he had purchased, to his co-trustee is excusable — When his executing assignments of mortgages and permitting the co-trustee to retain the proceeds, is defensible — When the failure of the surviving trustee, for five years, to examine a safe deposit box, when examination might have prevented a loss, is excusable.

Upon the final settlement of the accounts of John F. Halstead, surviving trustee under the will of Charles J. Buckingham who died in 1889 and by his will created trusts for his two children, and upon which accounting they sought to charge Halstead with the *devastavits* of his deceased co-trustee, Robert F. Wilkinson, who died in 1903 a debtor to the trust funds in almost their entire amount, it appeared that the trustees had accounted as executors in 1890 when they took over the trust funds from themselves as executors, in 1892, and in 1898, that Wilkinson had been implicitly trusted by the testator and was so trusted by the children, the beneficiaries, until his death, they having given him powers of attorney to endorse checks and receive for them all trust income, that about the time of the accounting of 1892 Wilkinson, who had been in possession of the testator's securities during the latter's lifetime and since then, hired, in Poughkeepsie where he lived, a box in a safe deposit vault for the securities of the corpus of the trusts and gave Halstead a key thereto, that in 1898 Halstead went to the vault with Wilkinson, that the latter showed him the securities, that Halstead found them correct, that Halstead never examined the securities again until after Wilkinson's death, when he found that the latter had surrendered the original box and that only a remnant of the securities was in another box, hired by Wilkinson individually. It further appeared that, at the time of the ac-

Digitized by Google

counting of 1898 a very large part of the corpus of both trust funds consisted of unregistered railroad and municipal bonds and of notes secured by trust deeds of Illinois farm lands, that the notes and deeds were taken in the name of local agents who assigned or endorsed them in blank, and that all these instruments remained, while in the hands of the trustees, in the condition above described. It further appeared that Halstead purchased some of the railroad bonds, delivered them to Wilkinson for deposit, was consulted by him as to investments, kept the income account, that every month Wilkinson sent to Halstead, who lived in Brooklyn, what purported to be income, that Halstead deposited it to the joint credit of the trustees in a New York city bank, drew checks on the account made payable to the beneficiaries, that these checks were returned to Wilkinson, and that he, after signing them under his powers of attorney, deposited them in his individual account and therefrom had paid the beneficiaries, with punctuality, until two weeks before his death.

Held, that upon the facts, Halstead was not negligent in permitting the securities to remain of the same negotiable character as they were at the death of the testator or in purchasing others without requiring them to be made payable to or be registered in the names of the trustees jointly, the beneficiaries having failed to show any circumstance which tended to arouse their own suspicion or that of the surviving trustee or that there was the slightest reason to suppose that the safety of the fund was in danger.

That, as there had been no actual joint possession of the fund up to the time of the transaction by which the fund became accessible to each trustee, that transaction did not constitute negligence in Halstead.

That his turning over to Wilkinson, who had the actual custody of the fund, the unregistered railroad bonds which Halstead purchased, was, considering he purchased them in New York and there gave them to Wilkinson to take back to Poughkeepsie to the safe deposit vault there, a delivery defensible as necessary in the usual course of business.

That another charge of negligence, based upon the fact that Halstead joined necessarily in the execution of several assignments of mortgages belonging to the trusts and permitted Wilkinson to retain the proceeds, was not maintainable, where it appeared that Halstead's execution of the assignments was necessary in the ordinary course of business.

That Halstead's failure to examine the safe deposit box between 1898 and 1903 was not a negligent act, as he had no knowledge of his co-trustee's wrongful acts or anything to put him on inquiry and as he had, on the facts, done no wrong and omitted no duty.

Digitized by Google

PROCEEDINGS upon final judicial settlement of the accounts of a trustee.

Frank B. Lown and Allison Butts, for John F. Halstead, trustee.

Charles F. Cossum and George C. Kobbé, for beneficiaries.

HOYSRADT, S. Charles J. Buckingham, who died in 1889, nominated, in his will, Robert F. Wilkinson and John F. Halstead as executors and trustees. Both qualified at the probate of the will, accounted as executors in 1890, and took over as trustees two funds created for the benefit of Charles H. Buckingham and Martha W. B. Wood, children of the testator. It appears that the securities of which these two funds were composed, or a greater portion of them, came to the testator under the will of his brother, Stephen M. Buckingham, who died in 1887. Robert F. Wilkinson then, and until his death on June 29, 1903, an eminent lawyer, who was implicitly trusted by his clients and associates, had been attorney for Stephen M. Buckingham, and his executors, who administered upon an estate of over $700,000, and he was also the attorney for Charles J. Buckingham in his lifetime and had the custody of his securities, acting in the nominal capacity of trustee for him in the care and management of his property and affairs. It does not appear that there was any actual change in this relation after the death of Charles J. Buckingham, or in the custody of the property, down to the time of the trustee's accounting in 1892, or, in fact, to the subsequent accounting in 1898, and, in ratification of the confidence reposed in Wilkinson by the testator, the beneficiaries under the will gave him power of attorney to indorse checks for them and to receive all income accruing from the trust funds, and under this authority he received their income, deposited it with his private funds and sent them his individual checks. From the surplus income due to Charles H. Buckingham, one of the beneficiaries, Wilkinson made reinvestments. The confidential relations between Wilkinson and the beneficiaries

Digitized by Google

were of the closest nature, and, so far as the evidence indicates, were without dissension to the time of his death.

The two trustees, Halstead and Wilkinson, had agreed to render an accounting every five years and accordingly, in 1898, proceedings were had in this court for the third accounting, in which a decree was entered charging the trustees with $67,658.16, the capital of the fund then shown to be held by them for the benefit of Charles H. Buckingham, and with $61,946.39, the capital of the fund then shown to be held by them for the benefit of Martha W. B. Wood.

Halstead, the surviving trustee, says that at the time of this accounting, he went to the Farmers & Manufacturers' National Bank of Poughkeepsie, where Wilkinson, after going into the safe deposit vault, brought to him the securities which represented these funds. Halstead then personally examined them and found them to correspond with the detailed enumeration in the account. After this inspection the securities were returned to the two tin boxes in which they had been previously kept and they were locked in the safe deposit vault. It appears that at or about the time of the accounting in 1892, Wilkinson hired a box in the safe deposit vault and delivered a key to Halstead, which would enable him to examine the contents of the box in the absence of Wilkinson. Halstead did not make such an examination before the accounting of 1898, when he found the securities called for by the account and he made no further examination until after Wilkinson's death. It is evident that Halstead acted upon the assumption that, under the circumstances, it was not incumbent upon him to examine the securities within the period intervening the accountings.

At the time of the last accounting in 1898 referred to, the securities, composing both trust funds, consisted of $34,-972.29 in railroad and municipal bonds and $60,630 in notes secured by trust deeds of Illinois farm lands. The trustees credited themselves with an aggregate of $32,650 representing the cost value of Kansas City real estate acquired through the foreclosure of mortgages, coming principally from the testator. The bonds referred to were unregistered. The trust deeds and notes were taken in the name of the local

Digitized by Google

agents, who assigned or indorsed them in blank, and they remained in that condition while in the hands of the trustees.

Halstead does not claim to have been a passive trustee. It has been shown that at regular intervals, to the month in which he died, Wilkinson remitted what purported to be the income to Halstead, who deposited it to the joint credit of the executors in the Mercantile National Bank of New York, and then drew checks upon this account payable to the beneficiaries. These checks were returned to Wilkinson for his signature. It seems to have been Wilkinson's custom, after signing these checks, to indorse the name of the beneficiary under authority of his power of attorney, and deposit them in his individual account, from which he paid the beneficiaries with punctuality until he left for Europe two weeks before his death. Halstead also kept the income account, while Wilkinson kept the capital account, entering with great minuteness each security in a ledger on a page by itself. Mr. Halstead also purchased some of the railroad bonds and delivered them to Wilkinson for deposit with the other securities, and was consulted by Wilkinson as to the Illinois investments made by the trustees. So it appears Halstead performed his share of the duties usually devolving upon two active trustees, leaving that portion of the work to Wilkinson for which he was better qualified. Frequent correspondence, statements and accounts passed between the trustees, and their relations appear to have been attended with the utmost confidence and harmony.

I recall no evidence in this case showing any transaction or communication between the beneficiaries and Halstead, and while it may not affect the material question involved, there is abundant evidence that they looked to Wilkinson for the administration and management of their affairs. Their powers of attorney completed practically all the trust they could have placed in him and there seems to have been not the slightest indication, prior to his death, that this trust had been misplaced. It has not been shown that the beneficiaries ever knew that the custody of the securities had been surrendered by Wilkinson or that they knew that Halstead had access to them after 1898.

Digitized by Google

Mr. Wilkinson died June 29, 1903, and Mr. Halstead subsequently discovered that the safe deposit box had been surrendered by his cotrustee, at what date does not appear, and that what remained of the securities were in another box, hired by Wilkinson individually. Further examination disclosed there was but a remnant left of the securities representing a value of $5,500, which indisputably belonged to the Buckingham estate. The amount of Wilkinson's misappropriation and indebtedness to this trust estate has been determined in other proceedings in this court at $120,710.04.

The beneficiaries now seek to charge Mr. Halstead with responsibility for his cotrustee's acts on general and specific charges of negligence which may be properly summarized as: Failure to require all the securities to be payable to or registered in the names of the trustees jointly, surrendering the fund and the securities he purchased to Wilkinson, and omission to examine the securities after the last accounting.

It has been urged that the surviving trustee was negligent in permitting the securities to remain of the same negotiable character as they were at the death of the testator, and in purchasing other securities without requiring that they be made payable to or registered in the name of the trustees jointly. The beneficiaries have failed to show any circumstance which tended to arouse the suspicion of the surviving trustee or themselves, or that there was the slightest reason to believe that the safety of the fund was endangered. No American authority has been cited to sustain this contention and, in view of the situation outlined in this case, it was not, in my judgment, negligent for Halstead to permit the continuance of the methods which the testator had established and assented to. Wilkinson resided in Poughkeepsie, while Halstead lived in Brooklyn, and, owing to the circumstances referred to and the situation of the trustees, it would have been expensive and unusually cumbersome if the fund was so controlled that every detail of the administration required the joint action of the trustees.

The beneficiaries urged that Halstead was negligent in permitting the transaction whereby the securities became

Digitized by Google

accessible to each trustee. It will be borne in mind that Wilkinson had sole custody of the fund prior to this transaction and that it, in effect, was Wilkinson's act giving Halstead access to the securities. There had been no actual joint possession of the fund and Halstead's consent to this arrangement, in view of the circumstances, should not be considered negligent.

The turning over to Wilkinson of the unregistered bonds purchased by Halstead presents the question of just what delivery of assets by a trustee to his cotrustees renders the former liable. It has been frequently held, and the rule is now well established, that where a trustee unnecessarily surrenders the joint custody of funds to the sole custody of his cotrustees he becomes liable for the application of the funds by his cotrustees. Purdy v. Lynch, 145 N. Y. 462; Nanz v. Oakley, 120 id. 84; Bruen v. Gillet, 115 id. 10; Paulding v. Sharkey, 88 id. 432; Matter of Provost, 87 App. Div. 90.

In the case at bar it appears that Halstead delivered the bonds to Wilkinson in New York to take to Poughkeepsie for deposit with the other securities, or, in other instances, directed the broker through whom the bonds were purchased to deliver them to Wilkinson for the like purpose. This was the usual and ordinary transaction and the delivery was made in entire good faith and comes within the definition of the word "necessary" in Purdy v. Lynch, *supra*. The joint possession of the bonds prior to their delivery is not established and should not be implied to charge Halstead with personal neglect.

In Davis v. Kerr, 3 App. Div. 322, and Glacius v. Fogel, 88 N. Y. 434, where there seems to have been no proof as to the actual custody of the fund, the courts have held that joint custody could be implied from the rendering of a joint account, but the proof in the case at bar is that, prior to the delivery of the key to Halstead, Wilkinson had actual custody of the entire fund. The Court of Appeals in Purdy v. Lynch, 145 N. Y. 462, discountenances the employment of legal fiction or conclusions for the purpose of holding a trustee for negligence. The circumstances referred to when

Digitized by Google

considered with the rules applied in the most recent cases fail to establish the absence of prudence and ordinary care in these transactions. It was within the usual course of business to accomplish the purpose of keeping the fund together in the safe deposit and was carried out in good faith by Halstead.

Another charge of negligence is based upon the fact that Halstead joined in the execution of several assignments of mortgages and permitted Wilkinson to subsequently retain the proceeds of those mortgages. It does appear that Halstead's execution of the assignments was necessary in the ordinary course of business and that his act was within the rule laid down in Purdy v. Lynch, *supra*, but not originating there. In Paulding v. Sharkey, 88 N. Y. 434, and in Croft v. Williams, id. 384, the Court of Appeals reached the conclusion that where the joint act is necessary and only formal it is insufficient of itself to impose liability, upon a trustee acting in good faith, for the dishonesty of his cotrustee. In Paulding v. Sharkey, three executors joined in a deed of real estate and the proceeds were received by one of their number in a check payable to him individually. He indorsed it and delivered it to one of his coexecutors, who received the money. The court held that the other executors were not liable for his default. This certainly presents a stronger case than the formal execution of an assignment of mortgage by Halstead, when the proceeds never came within his control. See also Matter of Johnson, 42 Misc. Rep. 651.

The question of Halstead's liability for his omission to examine the safe deposit box subsequent to the last accounting must be carefully considered within the principles laid down in the latest decisions in this State, which have, in a slight degree, modified the rigidity of earlier decisions and those in English cases. Much emphasis has been laid by the counsel for the beneficiaries upon Halstead's failure to act, when he might have prevented Wilkinson's defalcation, and upon the alleged results of such omission. But a proper consideration of the question requires an elimination of all conjectures as to what might have been avoided.

Digitized by Google

The question to be determined is "Did Halstead, in view of the circumstances existing at that time, employ such prudence and diligence in the discharge of his duties as in general, men of average prudence and discretion would, under like circumstances, employ in their own affairs?"

In determining the answer to that question, we are to look at the situation as it existed at the time when it is alleged that the trustee was negligent, not aided by subsequent events or disclosures. The surviving trustee's confidence in Wilkinson could not have been more fully justified from existing circumstances. Halstead had no knowledge of the misappropriation of the securities and there is not an atom of evidence that anything was brought to his attention which would excite the suspicion of a man of average prudence and vigilance, or that he overlooked any suspicious feature of Wilkinson's conduct or mode of living. His liability, if any, rests solely upon his failure, under those circumstances, to examine the safe deposit box to which he had access in the period intervening between the accounting of 1898, and the intended accounting of 1903, bearing in mind Wilkinson's domination over the fund during the testator's lifetime and until the accounting of 1898, when Halstead's investigation showed the funds to be intact, as they had been on two previous accountings.

In Wilmerding v. McKesson, 103 N. Y. 329, one of the leading cases, it appears that the trustee charged with liability had knowledge of the misapplication of the fund. He claimed to have had no knowledge, but it was shown that his cotrustee's firm was paying interest upon the fund misapplied. The finding of neglect was based upon his knowledge of the *devastavit*. The Court of Appeals (at p. 338) says: "Cases may arise where one executor is responsible for the acts of his coexecutor in the management of funds which have come into his hands, but where the funds of the estate were lawfully received by one of the executors, or were originally in his hands, or properly paid to him in the due course of administration, and there is nothing to excite suspicion as to the integrity or responsibility of such trustee, or to create a belief that the funds

Digitized by Google

have been improperly used or invested in violation of the established rules applicable to such cases, or were unlawfully allowed to remain uninvested, there is no rule which charges the executor or trustee who has not control of the fund, with the wrongful acts or misconduct of his associate."

The court held that McKesson, an active trustee, while liable for permitting the funds to be loaned to the firm was not liable for the wrongful conversion of the securities of the estate by Wilmerding without his knowledge or consent, and it was held that this loss, caused by the wrongful conversion by Wilmerding without his knowledge and with nothing to excite his suspicion that his cotrustee would be guilty of the misapplication of the funds of the estate, did not make him responsible. He was not chargeable as to this portion of the fund "with culpable negligence and none of the decisions sustain the rule under the facts presented that he should be held to the most strict and rigid accountability." This decision has a very important bearing upon the case at bar, and particularly as the Court of Appeals holds that while McKesson knew for a long period of the misapplication of a portion of the fund, he was not liable for his failure to protect the remainder of the fund, which was dishonestly taken.

The rule laid down in Williams on Executors is: "A devastavit by one of two executors shall not charge his companion provided he has not intentionally or otherwise contributed to it. For the testator having misplaced his confidence in one shall not operate to the prejudice of the other."

A coexecutor is not liable unless it appears that he had knowledge or assented to the acts done, or had notice which should excite his suspicion and put him on inquiry. A wrong done or a duty omitted must lie at the foundation of his liability. Sherman v. Parrish, 53 N. Y. 483; Adair v. Brimmer, 74 id. 539; Ormiston v. Olcott, 84 id. 339; McCabe v. Fowler, id. 314; Croft v. Williams, 88 id. 389.

Many other cases reiterate this rule.

In Matter of Hoagland, 79 App. Div. 56, Justice Wood-

Digitized by Google

ward writing the decision of the Appellate Division of this department, applies the test, as to the exercise of ordinary care and prudence, as "Whether the conduct of the executor has been guided by good faith, reasonable judgment and an intention to fairly and fully discharge his duty." In my judgment Mr. Halstead's administration measures up to this standard and that all the elements of liability, i. e., knowledge of the wrongful acts or assent to them, notice which should have aroused his suspicion, a wrong done or a duty omitted by him, are not established in this case.

Mr. Halstead does not come within the rule of liability laid down in cases where property held jointly has been transferred to the sole control of one trustee. The only element which would suggest a joint holding in this case is the rendering of a joint account and this, for the reasons previously stated, should not overcome the positive proof that the holding was not joint. The holding of the securities after the hiring of the safe deposit box certainly was not joint, as it required no act of Halstead for Wilkinson to reach the fund.

These views lead to the conclusion that Halstead is not liable for the default of his cotrustee.

Decreed accordingly.

Matter of the Application for the Revocation of the Probate of the Codicil to the Last Will and Testament of TRUMAN HAWLEY, Deceased.

(Surrogate's Court, Erie County, June, 1904.)

Will — Undue influence — Opportunity and motive to exert it — How far it must control — Feebleness of mind and body as affecting testamentary capacity.

Opportunity to exercise undue influence upon a testator, with motive to exert it, is insufficient to establish its exercise as it must further appear that the undue influence was sufficient to overcome his will.

To avoid a will on this ground, the conclusion must be inevitable that the testator's mentality was reduced to helplessness and that he succumbed to an influence making his will another's.

Feebleness of mind and body raises no presumption of a lack of testamentary capacity.

Digitized by Google

Misc.] Surrogate's Court, Erie County, June, 1904.

PROCEEDINGS to revoke probate of a codicil to the last will and testament of Truman Hawley, deceased.

Norton, Penney & Sears and John F. Pettit, for petitioners, asking revocation.

William D. Van Pelt, for executors.

Simon Fleischmann, for legatee, Grace Prince White.

MARCUS, S. The testator, Truman Hawley, died November 7, 1902, at the age of eighty-four years, at the home of Mrs. Grace Prince White, in Buffalo, N. Y., leaving a last will and testament dated February 10, 1902, and a codicil thereto, dated October 6, 1902. The will and codicil were admitted to probate on January 7, 1903, without contest, upon the petition of Charles H. Corbett (Sr.), nephew, and one of the executors named in his will.

On January 7, 1904, eight of the legatees named in the testator's will, being nephews, nieces, grandnephews, grandnieces and the wife of a nephew of the decedent, filed a petition to revoke the probate of only the codicil to the testator's will, substantially upon the grounds that the testator at the time of executing such codicil was not of sound mind and memory, and was unduly influenced in the execution thereof by the legatee, Grace Prince White. The contestants do not attack the validity of the original will. By the will, the testator bequeathed $1,500 to Mrs. White, and by the codicil he added a further bequest to her of $5,000.

It appeared from the testimony that the testator had for many years lived with Mr. and Mrs. Prince in Buffalo, who had adopted the legatee, Grace Prince White, when she was a child. Mrs. Prince was a sister of the decedent, Mr. Hawley, and the household for many years consisted of Mr. and Mrs. Prince, Mr. Hawley the decedent, and Grace Prince, who afterward became Mrs. White, her husband dying after her marriage. Mr. and Mrs. Prince died years ago, and upon their death the Prince family home was left, by will, to Mrs. White, and Mr. Hawley continued to live with Mrs. White at the old family home, until his death. The decedent left no

Digitized by Google

widow or children, and his only heirs and next of kin are nephews, nieces, grandnephews and grandnieces, none of whom ever appear to have manifested any interest in the testator, who for many years had led a retired life, living on the income of his estate, which amounts to about $14,000.

In August, 1902, the decedent took to his bed from the encroaching weakness of old age. He did not again leave his bed permanently, and died on November 7, 1902.

The doctor who attended him in his last illness is also one of the witnesses to the codicil, and he describes the progress of Mr. Hawley's decline, characterizing the condition as one incident to old age. He testified, however, to the mental soundness of the testator at the time of making the codicil, and there is no evidence that the testator's mind was at any time impaired. The other witness to the codicil was an attorney, who had attended to what little law business the decedent had had for many years preceding his death, and who had formerly boarded in the Prince household, and who was a friend of the Prince family, including Mrs. White and the decedent. This witness testified in great detail as to the circumstances attending the execution of the codicil. He stated that he was sent for by the decedent, who discussed the question of the codicil with him when Mrs. White was not present. That the decedent said he wanted to make further provision for Mrs. White, in view of her care and attention to him for many years while living in her house, and asked the witness what he thought about it, to which the witness replied that he thought Mr. Hawley should leave all of his property to Mrs. White. The decedent, however, with evident force of mind and will, said he did not think he ought to do this, and asked for a modified suggestion. The attorney thereupon said that as Mrs. White's property which she had received from the Prince estate was incumbered by mortgages to the extent of $5,000 the decedent might leave her a further bequest of $5,000 with which she could clear her property. The decedent expressed his satisfaction with this suggestion, and directed the attorney to prepare a codicil, making such bequest and directing its payment in advance of all other legacies. This codicil was prepared by the attorney,

Digitized by Google

and later in the day taken back to the testator when he signed and acknowledged it to the attorney and the doctor who witnessed it.

The learned counsel for the petitioner who seeks to revoke the probate of the codicil has presented to the court an able brief, which has received careful consideration. It is argued, with force and ingenuity, that the entire history of the latter part of Mr. Hawley's life tends to show that his physical decline must have been accompanied with a corresponding weakness of mind; and further, that the testator's residence at the home of Mrs. White and the attending circumstances warrant the inference that the bequest to her, contained in the codicil, was the result of undue influence exercised by her upon the testator.

It seems to me unnecessary to consider the evidence in detail, as I have come to the conclusion that this case clearly falls within the group of decisions in this and other States, which hold that opportunity to exercise undue influence, with motive to exert it, is not sufficient to establish its exercise, but that it must further appear that such influence was sufficient to overcome the will of the testator; and to avoid a will on this ground the conclusion must be inevitable that the testator's mentality was reduced to helplessness, and that he succumbed to an influence making his will another's, and that feebleness of mind or body raises no presumption of lack of testamentary capacity. Matter of Siegrist, 1 App. Div. 615; affg. 11 Misc. Rep. 188; Brick v. Brick, 66 N. Y. 144; Matter of Snelling, 136 id. 515; Children's Society v. Loveridge, 70 id 387; Cudney v. Cudney, 68 id. 152; Matter of Brunor, 19 Misc. Rep. 203; Matter of Metcalf's Will, 16 id. 180; Matter of Williams' Will, 15 N. Y. Supp. 828; Matter of Dunham's Will, 1 N. Y. Supp. 120.

The burden of showing mental incapacity or undue influence rests upon the contestants, even if it should be held that a confidential relation existed between the testator and Mrs. White, which can scarcely be claimed, a distinction being recognized, even under such circumstances, between a deed and a bequest under a will, and it seems clear to me that the contestants in this case have not met this burden. Matter

Digitized by Google

of Spratt, 4 App. Div. 1; Post v. Mason, 91 N. Y. 539; Matter of Suydam, 84 Hun, 514; Matter of Rohe's Will, 22 Misc. Rep. 415, 50 N. Y. Supp. 392.

I am satisfied, from the entire evidence before me, that the codicil, giving a further bequest to Mrs. White, was the deliberate act of the testator, and expressed his will and intention, and that the testimony of the subscribing witnesses to this codicil, one a practicing attorney and the other a practicing physician, and both of high standing in the community, uncontroverted as it is, fairly and reasonably leads to the conclusion I have reached.

The petition to revoke the probate of the codicil must, therefore, be dismissed upon the merits.

Petition dismissed upon the merits.

Matter of the Estate of ROBERT T. CLINCH, Deceased.

(Surrogate's Court, New York County, June, 1904.)

Transfer tax — When securities, representing the interest a deceased non-resident legatee had in the estate of his deceased non-resident father, are taxable.

Where the will of a non-resident of the State of New York has been admitted to probate in this State and securities, representing the interest he had in the estate of his father, also a non-resident, have, since the legatee's death, come into the hands of his executors and are, at the time of a transfer tax appraisal, in their possession in this State, the securities are subject to the transfer tax.

APPEAL from an order fixing and assessing the transfer tax.

Coudert Brothers, for appellant.

Potter & Kellogg, for respondent.

FITZGERALD, S. The securities and other property representing the interest which the deceased non-resident legatee

Digitized by Google

had in the estate of his father, who was also a non-resident, having since the death of the legatee, come into the hands of the executors of his will, which has here been admitted to probate, such property is subject to appraisement and taxation under the Transfer Tax Law. In Matter of Phipps, 77 Hun, 325; affd., 143 N. Y. 644, and in Matter of Chabot, 44 App. Div. 340; affd., 167 N. Y. 280, the interest which was declared not subject to the tax had not, at the time of the appraisement, come into the possession of the representatives of the deceased legatee or been ascertained or determined on an accounting of the executors of the testator or otherwise, and the court held the legacy not taxable, because it regarded it as being a mere right to claim or recover what ultimately might be found, but was then not ascertained, to be the amount or share of the estate to which the legatee was entitled on account of his legacy. The decision by the Appellate Division, and that of the Court of Appeals in the Chabot matter, recognize the distinction between the situation there considered and one like that here presented, and the judge delivering the opinion in the Court of Appeals, in which all his associates concurred, uses language plainly indicating that, if the amount of the legacy had been ascertained on an accounting in the estate from which it had been derived, that circumstance would have sufficed to subject it to the tax, although it had not been paid over or delivered to the legatee's representative. See Matter of Huber's Estate, 83 N. Y. Supp. 772.

In the present case the property at the time of the appraisal was in this State, in the possession of the executors of the will of the legatee, which had been admitted to probate by this court, and it is, in my judgment, subject to a transfer tax.

The value of the contingent remainder assessed against the sister of decedent was based upon the combined values of the realty and personalty. It should have been limited to the latter. In this respect the order must be modified and, as modified, is affirmed.

Order modified, and as modified affirmed.

Digitized by Google

Matter of the Application of S. B. DAVID to Lay out a Highway in the Town of Lebanon, in Madison County, N. Y., and for the Assessment of Damages therefor.

(County Court, Madison County, June, 1904.)

Highway Law — Construction of sections 84, 92, 85 — Application for commissioners to lay out a highway — Oath required of them — Proceeding avoided by their failure to take it — Town not chargeable with costs to a land owner where the proceeding fails — Notice to town highway commissioner of the commissioners' meeting.

The requirement of section 84 of the Highway Law that commissioners, appointed by a County Court to determine upon the necessity of a highway proposed to be laid out in a town and assess the damages by reason of the laying out, shall "take the constitutional oath of office" means the oath prescribed in section 1 of article XIII of the Constitution of the State of New York requiring, among other things, an oath or affirmation to support the Federal and State Constitutions, and this requirement is mandatory.

Where it is not embodied in the oath taken, the proceeding is void, and the objection may be taken by the town commissioner of highways on a motion made to confirm the decision of the County Court commissioners.

The provision of section 92 of the Highway Law that in all cases of assessment of damages by commissioners appointed by the court the costs shall be paid by the town applies only where the proposed improvement is carried into effect, and where the proceeding is declared void an owner who had obtained damages from the commissioners for land proposed to be taken cannot recover of the town costs he incurred in the proceeding.

The failure of the County Court commissioners to give the town highway commissioner personal notice of the time and place of their meeting — the provision as to which notice is contained in section 85 of the Highway Law — does not invalidate the proceeding where the notices required by that section have been duly posted, as the posted notices are sufficient notice to the town highway commissioner.

APPLICATION by E. W. Cushman, to amend an order, made herein, on April 18, 1904, so that, in addition to the allowances therein made, an allowance may be made to him, as attorney for Sarah M. Morgan, as costs for services and dis-

Digitized by Google

bursements in the above-entitled matter, in such a sum as the court shall deem reasonable and just.

E. W. Cushman, for motion.

M. H. Kiley, for S. B. David.

Dayton F. Smith (C. A. Hitchcock, of counsel), for Lewis Close, commissioner of highways, opposed.

SMITH, J. By the decision of the commissioners, appointed to determine as to the necessity of the highway mentioned in the petition, and to assess the damages by reason of the laying out of such highway, it was certified and determined that it is necessary that the highway be laid out, and the damages were assessed as follows: William Blair, $238.40; Sarah M. Morgan, $342.18; Orril Hayward, $301.50.

On motion to confirm the decision of the commissioners, the supervisor and the highway commissioner appeared in opposition, and on the 18th of March, 1904, an order was made by this court, vacating and setting aside the decision of the commissioners, and by consent of the supervisor and commissioner, that order directed that the fees of the commissioners be paid by the town, and also by like consent certain allowances were made to M. H. Kiley, attorney for the petitioner, and to Dayton F. Smith, for himself and for the counsel, C. A. Hitchcock, for services rendered by them, the allowance to Mr. Kiley being for services as attorney for the petitioner, and the allowance to Mr. Smith being for services rendered by him and by the counsel Hitchcock in opposing the confirmation, and in proceedings to set aside the decision of the commissioners.

Section 84 of the Highway Law provides that the commissioners shall take the constitutional oath of office, and appoint a time and place at which they shall all meet to hear the commissioners of highway of the town where such highway is situated, and others interested therein. Section 85 of the Highway Law provides for giving notice of the time and place of the hearing, by posting such notice for at least eight

Digitized by Google

days in three public places of the town, and personally serving, on the owner and occupants of the land through which the proposed highway is to run, a notice of the time and place of the hearing at least eight days previous to the hearing, or by leaving such notice at the residence of the owners and occupants with a person of mature age. The statute does not require personal service on the commissioner of highways, and it has been held that the commissioner has no more interest than any other taxpayer. People ex rel. D., L. & W. R. Co. v. County Court, 92 Hun, 13.

I think want of notice to the highway commissioner did not invalidate the proceedings. The only notice to him required by the statute is the notice given by posting in three public places.

The section referred to requires the commissioners to take the constitutional oath of office; that is the first thing for them to do, and the validity of their subsequent proceedings depends upon their taking that oath, and thus qualifying themselves as commissioners. By article XIII, section 1, of the Constitution of this State members of the Legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ——— according to the best of my ability." An addition to this oath (not necessary here to be considered), is required of officers chosen at any election. By the same article, no other oath, declaration or test, shall be required as a qualification for any office of public trust. I know of no other oath of office described by the Constitution, and of no constitutional oath of office except the one quoted, and by section 84 of the Highway Law, the commissioners were required to take that oath. The Legislature had the right to prescribe the nature of the oath of office to be taken. The Legislature could have limited the oath of office which the commissioners should take, and had the act required them to have taken an oath simply to

Digitized by Google

faithfully discharge their duty there is no doubt but that it would have been sufficient and valid, but the Legislature has seen fit to require the commissioners to take this constitutional oath, and that requirement must be substantially complied with. The statute is mandatory.

The article in question is a limitation upon the qualifications of office-holders which may be imposed or required by the Legislature. It is an exclusion of anything in the nature of an oath except the one therein set forth. People ex rel. Bishop v. Palen, 74 Hun, 292.

In Rogers v. Common Council of Buffalo, 123 N. Y. 173, the court held that a statute by which an applicant for appointment to a position in a public office is made to show his fitness therefor does not constitute an illegal test within the meaning of this section, and that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their Legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office.

The Legislature had the right to prescribe the nature of the oath to be taken, and the requirement must be substantially complied with. The reason why the Legislature has required the commissioners to take the same constitutional oath required of public officers may not be apparent, but they have required it, as they had the legal right. The oath taken by the commissioners is substantially in the following form: "I do solemnly swear that I will faithfully and fairly try the questions and determine the issues referred and submitted to me as such commissioner, and make a just and true decision and certificate thereof, according to the best of my understanding." Substantial compliance with the form prescribed is essential to the validity of the oath, and if a material part of the oath be omitted it is as though no oath had been taken. 23 Am. & Eng. Encyc. of Law, 360; Matter of Executive Communication, 14 Fla. 277; Hoagland v. Culvert, 20 N. J. L. 387.

Where the statute requires the person elected or ap-

Digitized by Google

pointed to office, before he enters upon the duties of his office, to take an oath to faithfully perform the duties of the office, compliance therewith is a condition precedent to the officer's right to exercise the functions of the office. 23 Am. & Eng. Encyc. of Law, 354, and cases there cited. The same rule must require him to take substantially the oath prescribed.

In Shattuck v. Bascom, 105 N. Y. 39, it was held that where the form of oath to be taken by assessors is prescribed, it must be followed, and any material variation therefrom will invalidate the assessment.

It will be observed that the commissioners herein did not take the constitutional oath; they did not swear or affirm that they would support either the Constitution of the United States or of this State; hence they never qualified, and all their subsequent proceedings were unauthorized and of no force. People v. Connor, 46 Barb. 336.

The whole town had an interest in the proposed highway and had a right to require that the proceedings should in all material respects conform to the requirements of the statute, which in effect declares that until the commissioners take the oath of office required by the law, they are incompetent to do any other act as commissioners. It was an act necessary to give them jurisdiction to proceed in the discharge of their duty; the omission of which rendered all their acts *coram non judice* and void, because in laying out highways they act under a special and statutory authority; and it must appear upon the face of their proceedings or by proof *aliunde* that they acquire jurisdiction. Miller v. Brown, 56 N. Y. 383.

On motion to confirm the decision of the commissioners, this court had power to review all the proceedings, whether such proceedings related to the merits of the application or otherwise. People ex rel. Hanford v. Thayer, 88 Hun, 136; Matter of Lawton, 22 Misc. Rep. 426.

The objections that the proceedings are invalid may be made by the commissioner of highways on this hearing. People ex rel. Smith v. Allen, 37 App. Div. 248; People ex rel. Ottman v. Commissioners, 27 Barb. 94. Other objections have been urged by the counsel for the commissioner of high-

Digitized by Google

ways, but from the view I take of the commissioners not having taken the proper oath of office, I do not deem it necessary to pass upon those objections.

It follows that the commissioners could not make any valid award to the landowner, whose counsel now asks compensation.

I am fully persuaded that the order setting aside the decision of the commissioners was warranted, and it finally determined the question of the necessity of the proposed highway, and, of course, Mrs. Morgan cannot recover the damages awarded, and neither does she lose her lands. Matter of De Camp, 151 N. Y. 557.

By section 92 of the Highway Law, in all cases of assessment of damages by commissioners appointed by the court, the costs thereof shall be paid by the town except when reassessment of damages shall be had on the application of the party for whom the damages were assessed, and such damages shall not be increased on such reassessment, the costs shall be paid by the party applying for the reassessment.

As the commissioners decided that the road was necessary, and assessed damages for Mrs. Morgan, the counsel contends that she is entitled to the costs incurred by her in this proceeding.

The language of section 92, that in case of assessment of damages by commissioners appointed by the court, the costs are directed to be paid by the town, was plainly intended that in case the proposed improvement should be carried into effect, the costs and expenses occasioned by it should be defrayed by the town. It means in case there is a valid assessment of damages; it has no application to a case where the proposed improvement fails. Matter of Miller, 9 App. Div. 260.

Indeed, it has been held that the statute does not confer upon the highway commissioner power to employ an attorney upon the credit of the town in a proceeding to lay out a highway. People ex rel. Bevins v. Supervisors, 82 Hun, 298.

There is some force in the suggestion of counsel that, in-

Digitized by Google

asmuch as costs were allowed to the counsel for the petitioner, and to counsel employed to oppose the confirmation of the decision of the commissioners, and to set aside such decision, compensation should be allowed to the counsel employed by the landowner, but the costs thus allowed were, by the express consent of the supervisor, the town's fiscal officer and the highway commissioner, allowed in open court, which officers object, or at least do not consent, to costs being allowed the moving party, and the court must now determine as to whether such costs are a legal and enforceable claim against the town, and from the examination of that question I am led to the conclusion that the claimant has not a claim against the town, which the court has power to enforce; that her only remedy is with the town auditing board, who very likely would have the power to make some proper allowance.

The motion is, therefore, denied.

Motion denied.

RICHARD HENNESSY, Respondent, *v.* THE FORTY-SECOND STREET, MANHATTANVILLE & ST. NICHOLAS AVENUE RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Negligence — When a place for work is dangerous — Degree of care required of one necessarily working there — Duty of one, who knows he is there, not to injure him.

A contractor's employee working on a fence — the contractor is constructing along a trench it is excavating, for a city subway — running parallel to the tracks of a motor street railway distant from one of its tracks about thirty inches and which free space will be reduced one-half by the overhang of a car passing, is at work, necessarily, in a place of obvious danger, and where he is struck and injured, while at work, by a car, he may, although he did not look for the car and so gain time to get out of its way as he might have done, retain a verdict he recovered against the railroad corporation for his injuries, where it is shown on the trial that it was the custom of motormen to signal their

Digitized by Google

approach to the place, that the plaintiff relied on the custom, that the motorman of the car in question admitted that he knew the plaintiff was at work there, and where his testimony that he signaled his approach is disputed by the testimony of the plaintiff and that of his witnesses.

The motorman was charged with the duty of giving notice of his approach.

A charge of the trial court that the plaintiff was required to exercise only ordinary care is correct.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered in favor of the plaintiff upon the verdict of a jury, and from an order denying the defendant's motion for a new trial.

Bayard H. Ames and F. Angelo Gaynor, for appellant.

Avery, Schlesinger & Paul, for respondent.

GREENBAUM, J. The plaintiff, an employee of a contracting company which was engaged in excavating, for the new subway at Longacre square, between Forty-third and Forty-fourth streets, in the city of New York, a trench running parallel with and east of the north-bound track of the defendant, was assisting in the erection of a fence, along the side of the trench, distant about thirty inches east of said north-bound track.

The place where the plaintiff was working was obviously dangerous, as it appeared that the overhang of the defendant's car was about fifteen inches, leaving a space between the fence and the outermost edge of the car of about fifteen inches.

On February 14, 1902, the plaintiff had been thus engaged for about an hour and a half, and, while in the act of driving a nail into a wooden board upon the fence, was knocked down by the front part of the defendant's car and injured.

The plaintiff admitted that he did not see the car which struck him and that he relied upon the sounding of the gong as a warning of its approach and that it had been his practice to look for cars from time to time, but that he did not absolutely depend upon his looking, but relied also

Digitized by Google

upon the warnings that he expected would be given him by the motormen.

It was testified, that, during the time the plaintiff was working upon the fence, the motormen of the defendant's cars would give warning of their approach by sounding their gongs, and that, whenever the plaintiff was thus apprised of an approaching car, or whenever he would notice one coming toward him, he would walk to a bridge which had been built across the trench at a distance of about thirty feet from the place where he was working and thus get out of the way of the car.

The motorman expressly admitted that he was aware that the plaintiff and others were engaged in constructing the fence.

The court, in its instructions to the jury, referring to the rule of contributory negligence applicable to the case, charged as follows: "He (plaintiff) was also familiar with the fact that cars were almost constantly running along there, as our common experience will teach us. So therefore, under such circumstances he was bound to exercise that care, prudence and diligence which a careful man would exercise, being placed in the position which he was placed in. If he failed to do so and his failure to exercise the degree of care contributed to the injury in question, in that event your verdict will be for the defendant."

The defendant's counsel asked the court to charge the jury that the plaintiff, working in a place known to be dangerous to him, was required "to keep his senses alert and to be vigilant to look out for cars and avoid them at the time of their passage." This the court declined to do and in place thereof charged that the plaintiff was bound to exercise that care and diligence that a careful and prudent man would exercise under the conditions in which he was working.

The request was substantially one applicable to the degree of care required of pedestrians crossing railway tracks in a city. It seems to me that the rule of law, embodied in the request, was altogether too broad when applied to persons whose duty necessarily required them to work on

Digitized by Google

or so near a railroad track that it would be perilous to remain at the place of work when cars are in the act of passing.

In Smith v. Bailey, 14 App. Div. 283, a street sweeper had not noticed the vehicle that struck him because his back at that moment was turned toward it, and the court held that: "If it were necessary in the prosecution of his business that he should be in that position, of course no negligence could be imputed to him. If by reasonable care he could have put himself in a position where he could protect himself from dangers of this description, then he was bound to use this care, having a view to the work which he was engaged in prosecuting. We think, therefore, that this question was one which the jury was called upon to consider, and which they had a right to determine."

Dipaolo v. Third Avenue R. R. Co., 55 App. Div. 566, was also a street sweeper's case which followed the rule laid down in the Smith case, *supra*.

In Bengivenga v. Brooklyn Heights R. R. Co., 48 App. Div. 515, the plaintiff, "at the time of the injury was carrying hot asphalt upon a shovel from the side of the track and placing it between the rails of the track" and was struck by one of the defendant's cars under circumstances which ordinarily would have been held, as matter of law, as constituting contributory negligence. The court held that the defendant was chargeable with notice of the fact, that workmen were required to be on the track, both by its contract to repair the street made with the firm by whom plaintiff was employed and the actual conditions existing; that the person operating the car "was required to exercise extreme care for the protection of the workmen and that abundance of warning was required," that the circumstances required that the car should be "under such control that it could be stopped practically upon the instant;" that "whether plaintiff should have observed the car or not became a question of fact for the jury;" that the plaintiff "had the right to assume that warning would be given * * * and that plaintiff might rely upon the presumption that the operator of the car would

Digitized by Google

stop the same when it reached the point where he was upon the track." The reasoning in the cases just cited does not rest upon the circumstances, in the one case, that the person injured was in the employ of the municipality, or, in the other, that his employer happened to have a contract with the defendant to do the work on which the plaintiff was engaged at the time of the accident, but it has reference to the peculiar conditions under which those engaged in pursuits on the highway, at or near railroad tracks, are necessarily obliged to perform their work and to the obvious knowledge of these conditions on the part of those operating the cars upon such tracks.

Bearing in mind the reason for limiting, in such cases, the ordinary rule of contributory negligence applicable to pedestrians, it is easy to distinguish the case of Lyons v. Avis, 5 App. Div. 193, from the present one. In the Lyons case the person was injured by a passing truck while mixing mortar upon the highway in front of a building then in course of erection. It there appeared that, although his employer had a permit to place material upon the street, the permit did not necessarily confer authority to utilize the street for mixing mortar. Under such circumstances, it was held that the plaintiff "was nevertheless under protection of the law and could not be run over with impunity"—but as the plaintiff "was utilizing the highway for a purpose foreign to its ordinary use, a purpose which is specially permitted only because of exceptional business needs" and as it was necessarily "fraught with danger, it called for vigilance corresponding to the exigencies of the situation." Under these circumstances the court held that the plaintiff could not recover unless he used "diligence in avoiding danger, especially in looking out for teams."

It will be observed that there is a wide difference between the Lyons case and the one under review, in that in the former there are absent the elements that the injured one was necessarily obliged to work at or near a fixed place of peril such as a railroad track over which cars were constantly passing and that the driver was charged with knowl-

Digitized by Google

edge of the dangerous conditions under which the work was being done, so as to require him to give warning of his approach.

If the defendant was entitled to the instructions requested by him, then he was entitled to a dismissal of the complaint. It was admitted by plaintiff that he did not look for nor observe the car that struck him, and if it was his duty "to be vigilant to look for cars and avoid them at the time of their passage," then there was nothing to submit to the jury.

Nor can it be said as matter of law that the plaintiff had sufficient space wherein to remain in safety. The proofs affirmatively show that the situation was a dangerous one, and it does not appear that upon the trial there was any doubt upon this point. If the defendant had any intention of raising an issue of fact as to the sufficiency of this space as a place of safety, then he would at most have been entitled to have had that question submitted to the jury with appropriate instructions as to the laws of contributory negligence applicable to a situation, which afforded ample space within which to work in safety. O'Connor v. Union R. Co., 67 App. Div. 99, 101.

No such request was made and, as the defendant's motorman admitted that he knew that the plaintiff and others were working near the track and that he "came on ringing his bell," a fact which was contradicted by the plaintiff and his witnesses, the refusal to charge the jury as requested by the defendant's counsel was not error.

The judgment is affirmed with costs.

LEVENTRITT, J., concurs.

FREEDMAN, P. J. (dissenting). The plaintiff, while in the employ of a contracting company, at the time of the accident was placing a wooden brace upon a fence that ran parallel to and about thirty inches east from the north-bound track of defendant's road on Broadway. He worked with his back toward the car track and, while in this position, was struck by the side of a north-bound car after a portion of the

Digitized by Google

car had passed him. According to his own testimony he was familiar with the passing of the cars at the point in question and knew that he was in a dangerous position, but there is no evidence that he exercised any care to guard against the danger. His testimony does not show that he either looked or listened for the approaching car. In answer to the question: "You did not look at all unless you heard it?" he answered "No, sir." In answer to the question: "Did you look, or didn't you?" he answered "I didn't look, because if I looked and I saw it I would not stand there. I relied solely on the motorman giving me warning," etc., etc. He also testified that he did not listen for the car because he did not hear it coming, that he was the only man that got hurt and that everybody else got out of the way. There was not, therefore, under all the circumstances sufficient evidence upon which his freedom from contributory negligence could be found.

But even if it be assumed that the case was one for the jury, there was error in the charge. Defendant's counsel asked the court to charge the jury that if the plaintiff was working in a place known to be dangerous to him he was required to keep his senses alert and to be vigilant to look out for cars and avoid them at the time of their passage. This the court declined to charge and, in place thereof, charged that the plaintiff was bound to exercise that care and diligence that a careful and prudent man would exercise under the circumstances similar to the ones that he was working under at that moment. As there are facts to support the request and the point involved in it had not been covered by anything that preceded it, the refusal to charge as requested constituted reversible error within the rule laid down in Lyons v. Avis, 5 App. Div. 193. The cases of Dipaolo v. Third Ave. R. R. Co., 55 App. Div. 566, and Bengivenga v. Brooklyn Heights R. R. Co., 48 id. 515, do not apply. In the first of these cases it appeared that the plaintiff, as a street sweeper in the employ of the city, had been working in and about defendant's tracks for some two years and that it had been the custom of the motormen to sound a gong as cars were approaching street sweepers on

Digitized by Google

the track. In the second case the plaintiff was struck while placing a shovel of hot asphalt between the rails of the track. Under the peculiar circumstances of the case it was said: "The defendant was chargeable with notice of the fact, both by its contract to repair the street and its actual condition, that workmen were upon the track at this point, and were required to be in order that the work might proceed * * *. As the prosecution of the work required that the asphalt should be deposited while hot, it is quite evident that the operation of the car was to be had with regard to the plaintiff's being between the rails of the track; and we think that the plaintiff might rely upon the presumption that the operator of the car would stop the same when it reached the point where he was upon the road," etc.

The case at bar is entirely different. Plaintiff's work was not done upon or between the tracks but thirty inches away from them. He had sufficient space upon which to remain in safety if he straightened himself up. In fact a part of the car had passed him before he was struck. No custom was established pursuant to which he might have relied exclusively upon a warning to be given to him by defendant's servants, nor was it made to appear that the particular work upon which he was engaged and in which in no way concerned the defendant, had progressed for such a length of time that he could claim that the defendant should have taken notice of it and regulated the running of the car with reference to it and thus absolved him from the duty of looking out for himself.

The judgment and order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Judgment affirmed, with costs.

Digitized by Google

The Gray Lithograph Co., Respondent, v. The American Watchman's Time Detector Co., Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Pleading — A defense of the Statute of Limitations is a separate affirmative defense, not to be assisted by other denials of the complaint unless repeated in the defense — Demurrer to a separate defense of the statute when sustained.

The amended complaint in an action, begun December 24, 1903, alleged as a first cause of action that between December 31, 1896 and April 19, 1897 the plaintiff performed services of a certain agreed value for a New Jersey corporation and that on May 31, 1899, in consideration of a transfer made by it of all its assets to the defendant, a corporation of the same name, the defendant took over all its debts and, with the plaintiff's consent, assumed his, which remained unpaid. The plaintiff demurred for insufficiency to a second defense of the amended answer which, without denying any of the allegations of the complaint, set up the six years' Statute of Limitations as a defense to the first cause of action. The answer, beside this second defense, contained denials of the allegations of the complaint. From an interlocutory judgment sustaining the demurrer the defendant appealed.

Held, that as the affirmative defense of the statute — which was to be treated as a separate plea, not to be assisted by denials contained in other parts of the complaint unless incorporated in the plea by reference — merely set up the statute as a defense to the first cause of action, it admitted that cause of action and sought to bar it.

That the cause of action did not accrue until May 31, 1899, when the defendant assumed the plaintiff's debt, because the debtor was a foreign corporation and as such precluded from pleading in our courts the statute as a defense and that, as the statute was clearly insufficient as a defense to this action, a demurrer to the defense would lie, as a demurrer admitted only facts alleged and not mere legal conclusions.

Appeal by the defendant from an interlocutory judgment of the City Court of the city of New York, sustaining a demurrer interposed by the plaintiff to a defense set up in the answer.

Digitized by Google

Walter L. Bunnell, for appellant.

Henry Hoelljes, for respondent.

FREEDMAN, P. J. The amended complaint herein sets forth two causes of action, of which the first only concerns us here, the second being admitted by the defendant's amended answer.

The first cause of action alleges that, between December 31, 1896, and April 19, 1897, the plaintiff performed certain work, labor and services for a New Jersey corporation, bearing the same name as the defendant herein, which work, labor and services were of the reasonable value and agreed price of $115; that thereafter, and on or about May 13, 1899, all the liabilities of said New Jersey corporation, including said liability for $115 then owing to the plaintiff for said work, labor and services, were assumed and agreed to be paid by the defendant in this action in consideration of the transfer to it by said New Jersey corporation of all its assets, and that the plaintiff shortly afterward was informed of the assumption of said liability by the defendant and agreed and consented thereto, and that no part of said sum of $115 has been paid.

The second defense, contained in the defendant's amended answer, without denying any of the allegations of the amended complaint, alleges that said cause of action did not accrue within six years before the commencement of this action.

To this defense the plaintiff demurred upon the ground that it was insufficient in law upon the face thereof.

The action was commenced on December 24, 1903, as appears from the statement preceding the appeal papers.

The demurrer was evidently sustained upon the theory that, although the answer, besides the defense demurred to, contains denials of the allegations of the complaint, the defense must be considered as admitting the allegations of the complaint for the reason that such denials are not reiterated or re-embodied in said defense, and, therefore, form no part thereof.

Digitized by Google

This was correct under the peculiar circumstances of this case. It is true that the Statute of Limitations, to be available, must be set up by answer, and it is equally true that under section 507 of the Code of Civil Procedure, a defendant may set up in his answer as many defenses as he claims that he has, whether inconsistent with each other or not. But each defense must be separately stated and must be complete by itself. In Douglass v. Phenix Ins. Co., 138 N. Y. 209, it was expressly held that an affirmative defense set up in an answer is to be treated as a separate plea, and, upon demurrer thereto, the defendant is not entitled to the benefits of denials, made in another part of the answer, unless incorporated by reference and made a part of the affirmative defense. The defense of the Statute of Limitations is an affirmative defense. The defendant, in setting it up, did not plead generally that whatever cause of action the plaintiff may have had did not accrue within six years before the commencement of the action, but pleaded specially that the particular cause of action set forth in the complaint did not so accrue. This admitted the cause of action set forth in the complaint and sought to bar it, but the plea in this respect was insufficient for the purpose, for the reason that the said cause of action, under the authority of the Court of Appeals in Boardman v. Lake Shore & M. S. R. Co., 84 N. Y. 157, accrued on May 13, 1899, the date when the defendant assumed the indebtedness owing to the plaintiff, because the original debtor was a foreign corporation which could not set up the Statute of Limitations as a defense in our courts. In such a case, where the insufficiency of the plea of the Statute of Limitations is clearly apparent, a demurrer to the defense will lie, for a demurrer admits only facts alleged and not mere legal conclusions. Masterson v. Townshend, 123 N. Y. 458; Farrar v. Lee, 10 App. Div. 130.

In the case of the Staten Island Midland R. R. Co. v. Hinchliffe, 170 N. Y. 473, a demurrer to a defense setting up the Statute of Limitations was sustained.

The interlocutory judgment appealed from should be affirmed, with costs, but with leave to defendant to amend, if

Digitized by Google

so advised, upon payment of such costs and the costs in the court below.

TRUAX and SCOTT, JJ., concur.

Interlocutory judgment affirmed, with costs, with leave to defendant to amend, if so advised, upon payment of costs.

ANNIE KESSLER, Respondent, v. JOSEPH DEUTSCH et al., Appellants.

(Supreme Court, Appellate Term, June, 1904.)

Master and servant — To create liability of the master for an act of the servant the plaintiff must show affirmatively that the latter's act was within the general scope of his authority.

The master is responsible for an act of his servant, done within the general scope of the employment, while engaged in the master's business and to further it, and this whether the act be done negligently, wantonly or even willfully, but the plaintiff must establish by a preponderance of evidence that the servant acted within the general scope of his authority, apparent authority being insufficient.

APPEAL by the defendants from a judgment of the City Court of the city of New York, entered in favor of the plaintiff upon the verdict of a jury, and from an order denying the defendants' motion for a new trial.

Sanders & Feltenstein (Moses Feltenstein, of counsel), for appellants.

Louis Steckler, for respondent.

FREEDMAN, P. J. The action was brought to recover damages for an assault and battery upon the plaintiff by the defendants' servant who with others attempted to remove some property, from the plaintiff's premises, which he had purchased from the defendants on the instalment plan. Ever since Mott v. Consumers' Ice Co., 73 N. Y. 543, it is true,

Digitized by Google

the rule has been well settled and enforced in a number of cases that for the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even willfully. But in every case the burden of proof is upon the plaintiff to establish by a preponderance of evidence that the servant acted within the general scope of his authority. Apparent authority is not enough. McGrath v. Michaels, 80 App. Div. 458. The case at bar is in its essential features identical with Feneran v. Singer Mfg. Co., 20 App. Div. 574, and under the decision of that case the evidence in the present case was insufficient to authorize the submission of the issues to the jury.

Judgment reversed and new trial ordered, with costs to appellants to abide the event.

TRUAX and SCOTT, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

WILLIAM JAMES, Respondent, *v.* LIBBY, McNEAL & LIBBY, Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Sale — When a warranty of quality does not survive acceptance.

An acceptance by the vendee of personal property, manufactured under an executory contract of sale, after full and fair opportunity for inspection, estops him, in the absence of fraud, from thereafter raising an objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance are accompanied by some warranty of quality manifestly intended to survive acceptance.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered in favor of the plain-

Digitized by Google

tiff upon the verdict of a jury, and from an order denying the defendant's motion for a new trial.

J. Brownson Ker, for appellant.

Dittenhoefer, Gerber & James (David Gerber and Albert Frosch, of counsel), for respondent.

SCOTT, J. The plaintiff's assignor, one Willard, on February 20, 1899, purchased from the defendant a quantity of unsmoked farmers' sausages, to be manufactured and delivered on future dates. The contract, which was in writing, provided that the goods should be "all microscopically inspected and dry enough for export," and it appears from the evidence that the dryness of a sausage is mainly determined by the amount of fat it contains.

In April the defendants shipped 100 boxes of sausages to Willard, which arrived in New York on April twenty-second. Willard, with the assistance of a clerk, examined the sausages by opening some of the boxes and cutting open some of the sausages. So far as appears he had ample opportunity to make, and did make, as thorough an examination as he deemed necessary and there is nothing from which it can be inferred that the sausages he actually examined were not a fair sample of the whole consignment. Willard had purchased the sausages for shipment to a customer in France, and after he had examined the goods he expressed doubts whether they were sufficiently dry, or free from fat, to be accepted by his customer. The defendant was represented by one Davenport, who had negotiated the sale and was present when the goods were examined, and who insisted that they were not too fat, but were of the quality specified in the memorandum of sale. Willard asked for a reduction in price, which Davenport refused to concede. Finally Davenport agreed, in writing on behalf of the defendant, if any claim should be made "for too much fat in 100 boxes Farmers (sausages) to make the same good." It is quite evident, from the discussion leading up to the making of this agreement, that what both parties understood was that de-

Digitized by Google

fendant was to make good to Willard, if his customer in France should make a claim against him for excessive fat in the sausages. Upon the receipt of this agreement, and undoubtedly in reliance upon it, Willard waived his objection to the quality of the sausages and accepted and paid for them. They were shipped to France, but never reached Willard's customer because the French authorities refused to permit them to be landed; consequently, of course, no claim for excessive fatness was ever made upon Willard by his customer. What particular defect the French authorities found in them does not appear. The sausages were reshipped to New York and, in July, were sold for much less than the price paid the defendant by Willard. On their arrival here they were examined by an expert employed by Willard, who testified that he found signs of deterioration in the sausages indicating that they had been at the time of original packing not sufficiently dried, but although the question was twice put to him point blank, he declined to say that they had been too fat for export, only saying that they "evidently contained an abundance of fat, a trifle more than is usually put in a dry sausage." This was the only witness called by plaintiff to establish the fact of the inferior quality of the sausages. The defendant produced two witnesses who testified that the sausages, when delivered to Willard, were in perfect condition, and conformed, as to quality, with the terms of the contract of sale.

It is urged, in support of the judgment, that the defendant's undertaking, in the memorandum of sale, that the sausages should be dry enough for export, was a warranty, and that, inasmuch as the general rule is that a warranty survives acceptance, Willard might, notwithstanding his acceptance of and payment for the goods, afterward sue the defendant for a breach of the warranty. There is no magic in mere words, and the relative rights of the parties will not be altered whether we call the agreement, as to the quality of the goods to be delivered, by the name of warranty, or by some other name. Nor is it safe to assume, even if the undertaking as to the quality of the goods be properly called a warranty, that the general rule that a warranty survives ac-

Digitized by Google

ceptance applies to every undertaking or agreement which is properly and commonly designated as a warranty. The cases dealing with the rights and obligations flowing from warranties are innumerable, and if mere extracts from opinions be read without careful regard to the facts dealt with, it may be found difficult to reconcile all of the decisions. There is, however, an underlying principle upon which rests both the rule that warranty survives acceptance, and the apparent exceptions to the rule. That principle is that if it appears, from the nature of the warranty, and the character of the property warranted and the relations of the parties to each other and to the subject of the warranty, that it was intended that the vendee should rely upon the warranty in accepting the goods, as an assurance that he is accepting what he contracted to buy, the warranty will survive acceptance, but if the warranty be that the goods are of a certain kind or quality, and a mere inspection will show whether or not they are of such kind or quality, and the vendee has full opportunity to inspect them and does in fact inspect them before acceptance, the reason for the survival of the warranty ceases, and it will not survive acceptance. In Brigg v. Hilton, 99 N. Y. 517, there are expressions in the opinion which, taken alone, lend color to the contention that a warranty of quality always survives acceptance, even when full opportunity to inspect the goods precedes the acceptance. An examination of the facts shows, however, that it is authority for no such proposition. The goods sold were cloakings which had been sold by sample. The goods delivered were inferior to the samples and if inspected before acceptance their inferiority would have been apparent. The warranty was not, however, a part of the contract of sale, but a collateral agreement, and before defendant received the goods the plaintiff had exhibited other samples represented to be samples which came with the goods from the manufacturers, and which were equal in quality to the original samples. It is easy to see that it might well have been and probably was the intention of the parties that the defendant should accept the goods without inspection, in reliance upon the collateral warranty and upon the exhibited samples shown as

Digitized by Google

accurately representing the delivered goods. In Parks v. Morris Axe & Tool Co., 54 N. Y. 586, cited and relied upon in Brigg v. Hilton, the subject of the sale was cast steel to be manufactured into axes and the warranty was that it should "be equal in quality to Jessup's or other standard brands." Whether or not the steel would have been equal to the warranty could be determined only after the axes had been manufactured from it and stress is laid upon the fact in the opinion, wherein it is said: "Obviously mere inspection could not determine whether the steel delivered was the best axe steel and equal in quality to any English brand. In order therefore to any substantial protection of its rights, the defendant was compelled to rely upon the warranty." In Fairbank Canning Co. v. Metzger, 118 N. Y. 260, the warranty was collateral to the contract of sale, and was to the effect that plaintiff would deliver to defendant beef from cattle that had not been heated before being slaughtered. As was observed by the court, the warranty was of such a character "that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew or could know whether they were heated or feverish. Inspection immediately after placing the beef in the car would not determine it," and for that reason it was held that the warranty necessarily survived the acceptance. In Hooper v. Story, 155 N. Y. 171, the subject of sale was a varnishing machine and the warranty was that it would turn out a certain quantity of work per day. Obviously its capacity to turn out work could not be determined until it was tested, and it could not be tested until it had been accepted, and, therefore, to make the warranty effective it must survive acceptance. There are to be found many authorities in this State for the proposition that in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and conformable to the contract, and bars all claim for compensation for any defects that may exist in the article. It was so held in Gaylord Mfg. Co. v.

Digitized by Google

Allen, 53 N. Y. 515, wherein it was also held that it made no difference whether the warranty was express or implied. In Gurney v. Atlantic & G. W. R. Co., 58 N. Y. 358, the court recognized and declared the general rule that when articles are sold upon an executory contract, the delivery and acceptance of the article, after examination or an opportunity to examine them, are a consent and agreement that the articles correspond with the contract, and preclude a recovery for any defects which may exist, at the same time recognizing and applying the other equally well-settled rule that the vendee must have an opportunity to examine, and when from the terms of the contract, or the nature of the article this can only be done by use, and such was, therefore, the mode of examination contemplated, the vendee is not foreclosed until the test is made. In Studer v. Bleistein, 115 N. Y. 316, the authorities dealing with the rule now under discussion are exhaustively examined and reviewed, and the rule is restated as follows: "An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance are accompanied by some warranty of quality manifestly intended to survive acceptance." To the same effect is Coplay Iron Co. v. Pope, 108 N. Y. 232. The case now before us falls within the letter and reason of the rule established by the authorities last cited. The contract of sale was executory; the undertaking or warranty of quality, that the sausages should be "dry enough for export" was one of the terms of the contract itself; the defect, if any existed, was patent and discoverable upon inspection; Willard, plaintiff's assignor, had full opportunity to examine them, and after such examination accepted them. It is clear that he did not rely upon the warranty in accepting. He may have relied upon his own judgment. He certainly relied upon the new agreement made by Davenport, on behalf of defendant, but he did not rely upon the original warranty. His acceptance of and payment for the goods after

Digitized by Google

examination, under the authorities above cited, estopped him from afterward suing upon the warranty. The second paper upon which plaintiff bases his right to a recovery is not properly speaking a warranty at all, but a contract of indemnity, which rests upon sufficient consideration. The plaintiff's assignor and defendant's agent differed as to the quality of the sausages and especially as to whether the customer in France would accept them. Willard's waiver of his objection and acceptance of the goods furnished a sufficient consideration for the contract. Whether the agreement made by Davenport to induce plaintiff to accept the sausages be regarded as a contract of indemnity, or as an extension, to the extent indicated by it, of the original warranty is not material because the event against which defendant undertook to indemnify Willard never happened. That event was "if claim is made for too much fat" defendant would make good, meaning evidently if a claim was made by Willard's customer in France. No such claim was ever made because the goods never reached the customer. Why their entry into France was forbidden does not appear. It may have been for excessive fat, or for some other defect not covered by the warranty. At all events the contingency against which defendant undertook to indemnify Willard did not arise. The plaintiff, therefore, showed no right under the agreement of April 22, 1899.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

FREEDMAN, P. J., and TRUAX, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Digitized by Google

EMIL LEDERER, Respondent, v. ETTIE ADLER, WOLF LAZARUS, MORRIS LAZARUS and HARRY LAZARUS, Appellants.

(Supreme Court, Appellate Term, June, 1904.)

Calendar — Filing of note of issue before service of notice of trial.

A case should not be stricken from the calendar merely because the attorney filed his note of issue before he served his notice of trial, where both acts were done by him on the same day, and this because the law does not often take account of fractions of a day.

APPEAL by the defendants from an order of the City Court of the city of New York, denying a motion to strike the above-entitled cause from the calendar.

Benjamin Reass, for appellants.

Henry Kuntz (Sigmund Horkimer, of counsel), for respondent.

MACLEAN, J. On one and the same date, April 16, 1904, the plaintiff filed his note of issue and served his notice of trial. Inasmuch as the note of issue must have been filed before one o'clock in the afternoon of that day, it being a Saturday, and the notice of trial was served at half-past four o'clock in the afternoon, the appellants contend that this cause was improperly upon the calendar for the reason that under section 3162, Code of Civil Procedure, as interpreted in Miner v. Galvanotype Engraving Co., 30 Misc. Rep. 200, the notice of trial should be served before the filing of a note of issue, which "must * * * state the date or the term for which the notice has been given." The nicety of sequence in events is hardly commanded by the statute, which does not forbid an attorney or his clerk from preparing the two papers on the same day and carrying both out at the same time for service and filing, although one may by an hour or two anticipate the other, for, provided due and timely information be given, the law, especially in

Digitized by Google

matters of practice, seldom takes account of immaterial fractions of a day or depends upon casuistical sequences and subsequences. The order should be affirmed.

Order appealed from affirmed, with costs and disbursements.

FREEDMAN, P. J., and SCOTT, J., concur.

Order affirmed, with costs and disbursements.

GASTANO GUARINO, Respondent, *v.* THE FIREMAN'S INSURANCE CO. OF BALTIMORE, Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Pleading conditions precedent — Code Civ. Pro., § 533 — Failure of the plaintiff to plead that he "duly" performed, etc.— He has no right to interline "duly" in the original complaint.

Where an amended complaint served in an action to recover upon a fire insurance policy does not allege the facts showing performance by the plaintiff of its conditions, the defect is not cured by a general allegation of performance, permitted by the provisions of Code Civ. Pro., § 533, relative to pleading conditions precedent, where the word "duly", required by that section, is omitted.

The plaintiff has no right to interline this word in the original of the copy complaint served, as the defendant has a right to consider the complaint served as the one he is to answer and that the cause is to be tried upon the issues raised by his answer to that complaint.

APPEAL from a judgment of the City Court of the city of New York in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial.

Donald McLean, for appellant.

Antonio C. Astarita (Louis Jersawitz, of counsel), for respondent.

Digitized by Google

MacLean, J. In an action to recover upon a policy of fire insurance, the plaintiff served upon the defendant an amended complaint in which he failed to allege the facts showing performance of conditions. This was not cured by the general allegation permitted by section 533 of the Code of Civil Procedure, because the word "duly," a word of substance, not of form, was omitted (Clemens v. American Fire Ins. Co., 70 App. Div. 435), nor by any interlineation of that word in the original amended complaint, for it is recognized "that a defendant has a right to consider the complaint which is served upon him, or his attorney, as that alone which he is required to answer, and that it is upon the issues raised by his answer to this complaint that the cause is to be tried." Trowbridge v. Didier, 4 Duer, 448, 450. Therefore, the motion by the defendant, at the opening to dismiss on the ground that the complaint failed to state facts sufficient to constitute a cause of action, was proper and was saved by his exception to its denial. The judgment must, therefore, be reversed and a new trial ordered.

Freedman, P. J., and Scott, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

The George A. Fuller Co., Appellant, *v.* The Manhattan Construction Co., Respondent.

(Supreme Court, Appellate Term, June, 1904.)

Action, on a lease, for rent — Eviction necessary to a breach of a covenant of quiet enjoyment — Eviction when a defense to rent — A tort is not a proper counterclaim in such an action.

To constitute a breach of a covenant of quiet enjoyment, contained in a lease, there must be an actual eviction, or a constructive eviction and the latter cannot be deemed to have occurred unless there has been a surrender.

Digitized by Google

To constitute a defense to an action for rent the eviction must take place before the rent becomes due.

Allegations of an answer, interposed by a tenant to a complaint for rent, that because it was due and unpaid the landlord threatened him and prevented him from removing his property from the demised premises, sound in tort and damages therefor cannot be counterclaimed by the tenant in this action.

APPEAL by the plaintiff from an interlocutory judgment of the City Court of the city of New York, overruling the demurrer of the plaintiff to the amended answer to the amended complaint and to the counterclaim contained therein.

John B. B. Fiske, for appellant.

Henry J. McClelland, for respondent.

SCOTT, J. The complaint alleges the incorporation of the plaintiff and the defendant; that the plaintiff was the lessee of a certain building; that on May 23, 1903, the plaintiff leased to the defendant two rooms in said building for the period of eleven months, ending May 1, 1904; that the rent for the months of November and December, 1903, and January, February and March, 1904, became due and were demanded, but the plaintiff has refused to pay the same. The answer denied on information and belief the incorporation of plaintiff, and that it was lessee of the building, and denies the allegations of paragraphs 7, 8 and 9 of the complaint, being the allegations respecting the rent for the months of January, February and March, 1904. It then sets forth, as a separate defense, that the rent for November and December became due and was unpaid, that the plaintiff harassed and annoyed the defendant by threats and intimidation, and that when, in March, 1904, the defendant decided to leave said rooms, the plaintiff prevented it from removing its effects therefrom. For a third defense, and by way of counterclaim, the defendant reaffirms the allegations of its second defense, and demands damages therefor. The plaintiff demurred to the whole answer as insufficient in law upon the face thereof, and separately demurred to

Digitized by Google

the counterclaim as not stating facts sufficient to constitute a cause of action. The demurrer was overruled. The whole theory of the defense and counterclaim is based upon the erroneous apprehension that the covenant of quiet enjoyment in a lease is broken simply because the landlord in some way annoys the tenant in the possession and enjoyment of the demised premises. Such is not the law. To constitute a breach of the covenant there must be an actual or constructive eviction, and there cannot be deemed to have been a constructive eviction without a surrender of the premises. And to constitute a defense to an action for rent the eviction must take place before the rent becomes due. Gugel v. Isaacs, 21 App. Div. 504. In the present case the defendant did not attempt to leave before March fifteenth, and the rent for March, by the terms of the lease, became due on the first of the month. So, even if the defendant should claim that the acts of the landlord amounted to a constructive eviction and that they were about to surrender possession in consequence thereof on March fifteenth, these facts, if sustained, would be no defense to an action for the March rent. The facts stated in the second defense do not, therefore, constitute a sufficient defense to the action for rent. Nor are they sufficient to sustain a counterclaim. The acts of the landlord, if established, are not a violation of the contract of leasing, but amount to a tort, if anything, and damages therefor may not be counterclaimed in an action upon a contract of lease. It is clear, therefore, that the facts alleged in the second defense are insufficient, and that the demurrer to the counterclaim should have been sustained. The demurrer for insufficiency being to the whole answer was properly overruled if there is an issue raised by any of the denials or allegations. The defendant relies upon its denials. These are three in number, but unless they are denials of material allegations of the complaint, or serve to put in issue some fact alleged in the complaint which the plaintiff must prove in order to recover, and which the defendant may disprove, they raise no issue and are unavailing. The denial on information and belief of plaintiff's incorporation raises no

Digitized by Google

issue. The like denial that plaintiff is the lessee of the building in which defendant rented offices likewise raises no issue, because the tenant cannot question his landlord's title to the demised premises. The denial of the allegations respecting the nonpayment of the rent for January, February and March also raises no issue, when taken in conjunction with the circumstance that the lease is admitted by a lack of denial. That the rent became due and payable is a conclusion of law and not of fact and is not put in issue by the denial. Whether it was demanded or not is immaterial and the denial of a demand is not, therefore, the denial of a material fact. The general denial of all the allegations, including the allegation of nonpayment, is not sufficient to permit proof of payment, which must be pleaded in order to be proved. It follows that none of the denials are sufficient to relieve the answer of the charge of insufficiency.

Judgment reversed and demurrer sustained with costs in this court and the court below, with leave to the defendant to amend its answer within twenty days upon payment of costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment reversed and demurrer sustained, with costs, with leave to defendant to amend within twenty days upon payment of costs.

ANTHONY SCHWOERER, Respondent, v. LOUIS C. CONNOLLY, Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Lease — Construction — "Conditional limitations".

A lease stated that the tenant took, "subject to the conditional limitations hereinafter stated", an apartment to be occupied as a strictly private dwelling apartment by his family of four persons, and not otherwise, that he agreed that the occupation of the de-

Digitized by Google

mised premises by himself and family and the character of the occupancy were an especial consideration for the granting of the lease, it further states that the landlord expressly reserved the right to terminate the lease on five days' notice in writing of his intention to do so and that upon the giving and expiration of the notice the term should end, anything before contained in the lease to the contrary notwithstanding, and this was followed by the words: "this provision being intended by the parties hereto as a conditional limitation and to be so construed in all litigations and proceedings concerning it".

Held, that where no rent was due and unpaid the landlord could not arbitrarily terminate the lease on five days' notice, and this because the "conditional limitations", subject to which the lease was accepted, restricted the tenant to use the premises as a strictly private dwelling apartment for himself and family and his right to remain therein depended on a continuation of that situation — the right given the landlord to dispossess him on five days' notice being in a case where there had been a change in the occupation or character of the occupancy.

"Limitation" means restriction, and "conditional" has reference to a situation, state or external circumstance.

APPEAL by the tenant from a final order and warrant of dispossession, made in the Municipal Court, city of New York, eleventh district, borough of Manhattan.

Gilroy, Maher & Gilroy, for appellant.

Frank Thorn, for respondent.

FREEDMAN, P. J. The tenant, in these proceedings, held a lease for a term of three years and fifteen days, from April 15, 1903, to May 1, 1906, and was dispossessed in March, 1904, upon the ground that he was holding over after the expiration of his term. The landlord's contention was, and he was supported therein by the decision of the trial court, that under the terms of the lease, he had a right to terminate it on giving five days' notice, and without cause shown. The only question to be settled by this appeal is the proper construction of the first paragraph of the lease. The lease first recites that the tenant takes from the landlord "subject to the conditional limitations hereinafter stated, the third apartment on the third floor * * * to be oc-

Digitized by Google

cupied as a strictly private dwelling apartment by his family, consisting of himself, wife, child, and servant, and not otherwise." Then, after stating the sum fixed upon as rental and time of its payment, there follows this clause:

"And it is expressly understood and agreed upon the part of said tenant that the occupation of said demised premises by himself and family and the character of the occupancy thereof as above expressed is an especial consideration and inducement for the granting of this lease to him by said landlord who expressly reserves to himself the right and privilege to at any time terminate the same upon service on tenant of at least five days previous notice in writing of intention so to do, and upon the expiration of said notice so served this lease and the term thereby granted and demised shall cease and terminate, and be at an end and said landlord or his assigns shall thereupon be entitled to the immediate possession of said premises and have and enjoy same again as of his former estate and interest therein, anything hereinbefore contained to the contrary hereof in any wise notwithstanding; this provision being intended by the parties hereto as a conditional limitation and to be so construed in all litigations and proceedings concerning it."

Upon the trial no evidence of change in the occupation or character of the occupancy was given and the rent, for the month of March, 1904, had been paid in advance. The defendant offered no testimony but preserved his rights, by a motion for a dismissal at the close of plaintiff's case upon the ground that there was no evidence of the change of occupation and that the conditional limitation is based upon that.

We think this motion should have been granted. The construction put upon the terms of the lease by the landlord is unwarranted, and gives no force or effect whatever to the phrase "subject to the conditional limitations hereinafter stated" and the other portions of the lease above quoted. The lease was given by the landlord and accepted by the tenant "subject to certain conditional limitations."

"Limitation" means restriction, and "conditional" has reference to a situation, state or external circumstance.

Digitized by Google

The limitations contained in the lease restricted the tenant to the use of the premises as a strictly private dwelling to be occupied by himself, wife, child and servant, and not otherwise. Upon the continuance of this situation depended his right to remain in the premises and the right of the landlord, after the giving of five days' notice mentioned in the lease, to dispossess the tenant was dependent upon a change in these conditions, that is to say, a change in the occupation or character of the occupancy. In other words, the right is given to the landlord to terminate the lease upon but five days' notice, upon failure of the tenant to perform the condition imposed upon him of keeping the premises for the same occupants and the same purposes as rented. Any other construction would deprive the words "conditional limitation" of any meaning as used in the lease and would give the landlord an unconditional, absolute and arbitrary right to dispossess his tenant without cause, express or implied. There is a marked dissimilarity between the terms of the lease, in this case, and the terms of the lease in the case of the Manhattan Life Ins. Co. v. Gosford, 3 Misc. Rep. 509, relied upon by the respondent herein. In the latter case the lease provided "that if the landlord shall at any time deem the tenancy undesirable"— and it was there held that the landlord need give no reason for deeming the tenancy undesirable. The language used therein is quite similar to that frequently used in a chattel mortgage, in which the mortgagee reserves the right to take possession of the mortgaged property and sell the same at either public auction or private sale "if he shall at any time deem himself unsafe," and in such cases it has been frequently held that the mortgagee can act according to his rights, therein given, at any time without giving any ground therefor. But it will be noted that in the use of such language there is no limitation whatever. As Mr. Justice Bischoff, in his opinion in the Manhattan Life Ins. Co. v. Gosford, *supra,* says: "The lease did not circumscribe the landlord's discretion * * * by requiring that it should proceed from sufficient grounds."

In the case at bar the whole lease must be read together and the intent of the parties gathered therefrom; no harsh or

Digitized by Google

strict construction should be given thereto when, by a fair and reasonable one, exact justice can be done between the parties, and it is not fair to presume that the tenant intended to bind himself to the restricted use of the premises as a strictly private dwelling apartment for but four persons, for a term of over three years, and at the same time confer upon the landlord the absolute right to terminate the lease without cause after five days' notice.

Final order reversed. New trial ordered, with costs to the appellant to abide the event.

TRUAX and SCOTT, JJ., concur.

Final order reversed. New trial ordered, with costs to appellant to abide event.

ROBERT HYMAN, Appellant, *v.* BARNET SEGAL, Respondent.

(Supreme Court, Appellate Term, June, 1904.)

Municipal Court of the city of New York — Orders appealable — Levy on execution, how discharged pending defendant's appeal.

An order of a justice of the Municipal Court of the city of New York denying a motion to vacate an order of arrest is not appealable.

***Semble*, that where a defendant, against whom a judgment has been recovered in said court upon which execution has been issued and levy made thereunder on his personalty, files a notice of appeal and serves upon the plaintiff an undertaking, in the form required by the Municipal Court Act (L. 1902, ch. 580, § 314), for more than $100 and for twice the amount of the judgment but in an amount less than $500, the effect of the service is merely to stay further proceedings under the execution, and if the defendant desires to discharge the levy he should file a new undertaking, of similar conditions, in $500, in which event the Municipal Court would, under Code Civ. Pro., § 1311, taken in connection with section 20 of the Municipal Court Act, have jurisdiction to make an order discharging the levy.**

APPEAL by the plaintiff from an order, made in the Municipal Court of the city of New York, discharging a levy made by a city marshal under an execution issued upon a judgment rendered in favor of the plaintiff.

Digitized by Google

Morris Meyers, for appellant.

Fluegelman & Bach, for respondent.

FREEDMAN, P. J. Judgment was rendered herein in favor of the plaintiff on December 4, 1903. An execution was immediately issued to the marshal, under which he levied upon certain personal property belonging to the defendant and took the same into his possession. On the same day the defendant filed a bond in the sum of $300, being more than double the amount of the judgment, and served a notice of appeal. Under section 314 of the Municipal Court Act (L. 1902, chap. 580), this action, after service upon the marshal of a copy of the undertaking properly certified, etc., stayed further proceedings under the execution. Thereafter the defendant made a motion to vacate the levy aforesaid, which motion was denied by an order made February 1, 1904. On February 4, 1904, the defendant filed a new undertaking in the sum of $500, containing the usual condition, covenanting to pay the amount remaining due upon the judgment after the return of an execution, wholly or partly unsatisfied, and, upon March 8, 1904, again made a motion for an order requiring the marshal to turn over to the defendant all the property levied upon by him by virtue of the execution issued herein, upon payment to him of his fees, etc. This motion was granted, and from such order the plaintiff appeals.

This order is not one from which an appeal can be taken. Leavitt v. Katzoff, 43 Misc. Rep. 26, 86 N. Y. Supp. 495.

If, however, we were called upon to pass upon the question, we should be inclined to hold that the defendant's practice was correct. Section 1311 of the Code of Civil Procedure provides that "where the security, given upon an appeal, taken from a final judgment of * * * the municipal court of the city of New York, is equal to that required to perfect an appeal to the court of appeals (which is the sum of $500), * * * the court, in which the judgment appealed from was rendered, * * * may * * * make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal

Digitized by Google

property, made by virtue of an execution, issued upon the judgment appealed from."

This section in express terms is made applicable to the Municipal Courts and no provision for the discharge of a levy is contained in the Municipal Court Act. The undertaking provided for in section 314 of that act and the service of a certified copy as provided in section 316 merely "stays further proceedings" under the execution. The first undertaking given by the appellant herein was insufficient in amount to enable him to invoke the provisions of section 1311, being in the sum of $300 only. The last undertaking was in the required amount and the appellant complied with section 1311 in the giving of the proper notice, etc., to obtain the order. It is true section 314 of the Municipal Court Act, referring to the undertaking to be given by the appellant, if he desires a stay, declares that "a copy of the undertaking with notice of the delivery thereof must be served with the notice of appeal." It would seem that such a provision should be held to be directory merely, and not mandatory. There is no good reason why an adequate bond, securing the respondent according to law, cannot be filed, and notice thereof given to enable the respondent to except to the sureties, such filing to be made at any time after an appeal is taken; such undertaking, however, if given in double the amount of the judgment would not entitle the appellant to an order vacating any levy, theretofore made, unless the amount of the undertaking was in the sum of at least $500.

If the contention of the plaintiff herein was correct, once a levy was made under an execution and the property of the appellant taken into possession of the marshal, the personal property so levied upon must there remain, with keeper's or storage charges accumulating thereon, during the pendency of the appeal, although the respondent at the same time was also secured by an undertaking in twice the amount of the judgment rendered.

Section 20 of the Municipal Court Act permits the application of section 1311 to the practice in Municipal Courts, the same not being in conflict therewith, and it would appear that the only way a judgment debtor could take to procure

Digitized by Google

the discharge of a levy, pending appeal, would be by following the provisions of that section. Nor does it seem material that in this case it was the second bond given. The first was insufficient to authorize the discharge of the levy. The second was as much a bond "given upon an appeal" as the prior one. It conformed to law, the sufficiency of the sureties was not questioned, and they were clearly liable for any amount remaining unpaid upon any judgment the plaintiff might obtain.

SCOTT, J., concurs.

MACLEAN, J., concurs in the result.

Appeal dismissed, with costs.

GEORGE D. ARTHUR, Respondent, *v.* THE PULLMAN CO., Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Negligence — Unexplained loss of a passenger's traveling bag at night in a sleeping car — When there is sufficient evidence of a carrier's negligence to raise a question of fact as to whether it has done its duty.

Proof, made in an action brought by a passenger, traveling at night from the Grand Central station in New York city to the Adirondack region, to charge a common carrier for the alleged negligent loss of his traveling bag, to the effect that he put it in his berth on his sleeping car, that the porter told him the bag would be safe there, that afterwards the passenger changed the bag to a state room, he had engaged for his party, to which the conductor and porter had keys but the passenger had not, that he told the porter of the change and that the latter said he would keep his eye on the baggage of the party, that the passenger then left the car, as the porter knew, to go to the dining car, that on his return, three-quarters of an hour later, the bag had disappeared, and that before his return a door of the car, very near his state room, which had been locked when he went to the dining car, was unlocked before the train reached the One Hundred and Twenty-fifth street station in New York, affords sufficient evidence to raise a question of fact whether the carrier had done its duty to the plaintiff and a judgment entered on a verdict for him will be affirmed.

Digitized by Google

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, second district, borough of Manhattan, in favor of the plaintiff.

Saunders, Webb & Worcester (Edwin D. Worcester, Jr., of counsel), for appellant.

Frank D. Arthur, for respondent.

FREEDMAN, P. J. There is no dispute as to the material facts in this case. The plaintiff, on October 11, 1901, in company with two ladies, purchased tickets for Loon Lake West, a station in the Adirondacks, and became a passenger on the Montreal Express, which left the Grand Central Station in New York city on that day at six twenty-five P. M. The tickets entitled the party to one berth and to a drawing-room, or stateroom, at the extreme north end of the forward sleeping car on the train. The door at this end of the car was locked. At first, the plaintiff put his baggage into the berth and the ladies put theirs into the stateroom. There was a dining car upon the train and the plaintiff went back to the rear end of the car to where a colored porter was standing and asked him if dinner was ready, and, being informed that it was, went to the dining car for the purpose of reserving seats for himself and the ladies. He then returned to his own car, and, meeting the porter at the steps at the rear end of the car, asked him if it would be safe for the baggage to be left in the car while the party went to the dining car, and the reply of the porter was "Why certainly it is safe." The plaintiff then rejoined his friends and, soon after, they all went to the dining car. Prior to going, however, the plaintiff put his own baggage into the stateroom where the ladies' baggage was and, upon leaving the stateroom, closed the door. This door had a lock thereon, but the conductor and the porter of the car had the keys thereof, and the testimony shows that the keys of staterooms are never given to passengers. As the plaintiff and the two ladies passed through the car to reach the dining car they again found the porter in charge of the car at the rear end, and plaintiff said to him "I have put my

Digitized by Google

things in the stateroom, so all the baggage is together. Keep your eye on it." To which the porter replied "I will." Upon the return of the party to the sleeping car, some three-quarters of an hour later, the plaintiff found missing a travelling bag and its contents, consisting of wearing apparel, etc., belonging to himself, the conceded value of which was sixty-six dollars and twenty cents. This bag and contents were never found. By some unexplained error the judgment rendered herein in favor of the plaintiff was for the sum of one hundred and twenty-five dollars damages. Both sides, however, concede this to be error, and that plaintiff, if entitled to any sum, is only entitled to the sum of sixty-six dollars and twenty cents damages.

Whether or not under the facts in the case the plaintiff can recover without proving negligence on the part of the defendant under the rule laid down in the cases of Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53, and Williams v. Webb, 27 Misc. Rep. 508, as distinguished in Adams v. New Jersey Steamboat Co., 151 N. Y. 163, need not be considered for the reason that I am of the opinion that there was sufficient evidence of negligence to raise a question of fact, to be determined by a jury, or the trial judge sitting in place thereof, as to whether or not the defendant was heedless of its duty to the plaintiff. The porter evidently had charge of the car; he had informed the plaintiff that his baggage could be safely left therein, he had notice that it had been placed in the stateroom to which he had a key, and to which room the plaintiff had no key, and to which the defendant does not allow passengers to have a key. It was not shown that the porter or conductor locked the door of the stateroom, although it was shown that the front end of the car was unlocked at or before the train reached the One Hundred and Twenty-fifth Street station, which was prior to the return of plaintiff and his party from the dining car.

The judgment must be reduced to the sum of sixty-six dollars and twenty cents and costs, and for that sum affirmed, with costs.

Scott, J., concurs.

Digitized by Google

MacLean, J. (Dissenting). "Sleeping car companies are neither innkeepers nor carriers * * * and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. * * * The relations of the carrier to a passenger * * * are quite different with respect to his personal effects from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom," with a key, the door of which he is asked to lock when going out, and to bolt when going to bed. "While the company running sleeping cars is held to a high degree of care * * * it is not liable for a loss of this character without some proof of negligence." Herein is no evidence of contractual relation between the plaintiff and the defendant respecting the stateroom in which he placed his luggage, and so no possible insurer's liability. He had a berth, but, not content with the measure of responsibility the use of that placed upon the company, chose to place his traveling bag in the apartment of his friends. When the plaintiff, on his way to dinner, asked the porter at the door of the car whether it was safe to leave the luggage, the porter expressed his own opinion merely by say, with a laugh, "Why, certainly it is safe;" and the porter's promise, "I will," when asked to keep his eye on it was the porter's personal promise.

The judgment should, therefore, be reversed and a new trial ordered.

Judgment reduced to the sum of sixty-six dollars and twenty cents, and as so reduced affirmed, with costs.

Digitized by Google

JOSEPH ROSENBERG, Appellant, v. THE GERMANIA BANK, Respondent.

(Supreme Court, Appellate Term, June, 1904.)

Conversion — Action against a bank by the plaintiff for the value of checks, payable to his order, deposited with and collected by the bank for a customer of its own after he had cashed them for the clerk of the plaintiff on an endorsement of the plaintiff's name, which the clerk had forged — Express and implied authority of the clerk to endorse — Estoppel.

Proof that a merchant, named Joseph Rosenberg, permitted his clerk, named Hecht, who kept the books, made out bills, collected debts, wrote letters, made deposits in the bank, and signed letters in Rosenberg's name, adding his own initial "H", permitted Hecht to use, for depositing in Rosenberg's bank checks payable to his order, a rubber stamp reading "Pay to the Northern National Bank Joseph Rosenberg", that, so far as appeared, Hecht never, to Rosenberg's knowledge, signed or endorsed Rosenberg's name on a check for transfer to his bank except by the rubber stamp, and that Rosenberg knew that Hecht had had Rosenberg's own checks and customers' checks to his order cashed at a saloon nearby, affords Hecht no express or implied authority to forge Rosenberg's name on the back of customers' checks to his order, and where Hecht does this, afterwards cashes the checks at the saloon, keeps the proceeds and the saloon keeper endorses and deposits the checks in his own bank and it collects them for him, there is no estoppel which prevents Rosenberg from recovering their value of that bank, in an action for conversion.

APPEAL by the plaintiff from three judgments in favor of the defendant, rendered in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Louis J. Frey, for appellant.

Julius H. Cohen, for respondent.

MACLEAN, J. Upon oral pleadings were brought these three actions for the conversion of certain checks drawn to the order of the plaintiff, and indorsed with his name by another. It is contended that plaintiff is estopped from dis-

Digitized by Google

puting these indorsements because of circumstances which he knew, or may be assumed to have known. This contention the learned trial justice has sustained and rendered judgment for the defendant.

The indorsements were made by one Hecht, the plaintiff's general clerk, among whose duties and occupations are enumerated that he kept the books, made out bills and accounts, collected debts, wrote letters, attended to making deposits in the bank. How he receipted bills and accounts is not shown. To letters, he signed his employer's name, with the addition of "H," his own initial. For depositing in the bank checks payable to his employer's order, he used a rubber stamp reading: "Pay to the Northern National Bank Joseph Rosenberg." It is not shown that Hecht ever signed or indorsed a check with plaintiff's name to plaintiff's knowledge, excepting by the stamp, for transfer to the plaintiff's bank. It was of frequent occurrence, almost like a practice, in the neighborhood, to send out checks to be cashed, particularly on Saturday afternoons, and especially to the liquor stores, one Gerdes' bartender testifying that they cashed checks for as much as $1,500, for different persons, on a Saturday. The plaintiff himself sent out checks in that way, he said, not oftener than once in four weeks, to the liquor store of one Delecker and he knew that when Delecker had not the money his checks had been taken to Gerdes'. Hecht went out with some of these checks, signed by his employer, to be cashed; then he took checks, not drawn by the plaintiff, but customers' checks drawn to the plaintiff's order, had them cashed, credited the accounts as with payments, but did not put the money into the cash or deposit it in the bank.

Of such character were those upon which this action is brought, checks of customers to the order of the plaintiff, which checks Hecht backed with his employer's name and had cashed by Gerdes' bartender. They were then deposited by Gerdes in the bank, here defendant, and collected by the bank in the usual course. Other circumstances were shown of less significance. Rosenberg was seen sometimes at Gerdes' saloon with Hecht. He repeatedly visited and

Digitized by Google

had meals at Hecht's boarding place. Rosenberg had confidence in his general clerk, as is commonly the case, commonly, too, deservedly for the relative rarity of the betrayal of such confidence is highly creditable to that respectable class in the community, the merchants' clerks, without whose faithfulness business could hardly be carried on by such men as the plaintiff, who, knowing nothing of bookkeeping, must trust somebody.

Not one of the incidents in evidence, nor all combined, make out or imply authority to write the plaintiff's name upon either side of a check. That of which the most is made, provision of and authority to use a stamp for the indorsement of checks for deposit, carried with it only power to do that specific thing under the method familiar, by custom, to every man and woman, in this town, of affairs enough to have a bank account. That method in its present prevalence is novel. Its legality is ancient doctrine. It was settled long ago that a person may be bound by any mark or designation he thinks proper to adopt, providing he intends to bind himself thereby. Brown v. Butchers' & Drovers' Bank, 6 Hill, 443. And, if the intention to bind by even a mark be shown, inquiry may not be made in court as to whether the person can write his name. Baker v. Dening, 8 Ad. & El. 94. At the beginning of the present practice, not many years ago, banks required of each customer a letter or other paper of request and indemnity. Increase of business, to a volume rendering the elder practice impracticable in many cases, especially of cashiers of banks, brought the convenient substitute of a stamp, for the written name of the payee, into use, until the usage ripened into the custom, recognized by the clearing-house and its members and by the subtreasury since its affiliation with that institution, savings banks alone of financial concerns still standing aloof.

Clamorous assertions that the plaintiff's action, under this well-defined and recognized custom, covers Hecht's forgery of his employer's name avail nothing. As little may it be said that reversal of this judgment and the ruling upon which it rests will endanger the business of banking, of such convenience to the commercial community, by hold-

Digitized by Google

ing that banks act at their peril. Of course banks, as others, who take paper, in a way, act at their peril. Herein a bank is party defendant, but not because of the writing of the employer's name by Hecht, which concerned the bank, only because of its guaranty by its customer, Gerdes, through his indorsement, and who must make that good. Neither of the cases relied upon helps the defendant. In one arising upon the extraordinary defalcation of Schuyler, who so startled the commercial community two generations ago (New York & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30), the court held that, where its directors do not direct, a corporation as well as an individual is liable for the acts of a person openly and notoriously held out as the agent and also placed and recognized as in position to be the author of the corporation's misfortune. In the other (Morris v. Hofferberth, 81 App. Div. 512), besides being between parties very differently situated, the misuse of the check was by a person who signed the name of his principal with the addition of his own, and who was designated as plaintiff's agent on the stationery and bill heads furnished by the plaintiff, and who furthermore was authorized to and did manage and conduct the entire business of the plaintiff, an absentee.

The determination of this appeal will establish no novel precedent, but, were that so to be, the court would need more than herein appears to determine that whenever a man, because of insufficient schooling, occupation in his workshop or other cause, employs a bookkeeper to do his counting-house work, he thereby exposes himself to such disposition of his funds as his bookkeeper may make under what a bartender or bartenders consider the bookkeeper's authority. The judgment should be reversed.

FREEDMAN, P. J., and SCOTT, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Digitized by Google

THE G. S. ROTH CLOTHING CO., Respondent, *v.* THE MAINE STEAMSHIP CO., Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Common carrier — In New York city notice of the arrival of goods transported may be given the consignee by a postal card.

Although it is the duty of a common carrier to deliver goods transported or give the consignee timely notice of their arrival, the notice need not, in the city of New York, be conveyed by a messenger, there being in that city a recognized local custom to use postal cards in such a case.

APPEAL by the defendant from a judgment in favor of the plaintiff, rendered in the Municipal Court of the city of New York, third district, borough of Manhattan.

Carpenter, Park & Symmers, for appellant.

Shafer & Levin, for respondent.

MACLEAN, J. As appears, by its receipts, the defendant received from the plaintiff, on September 15, 1902, a package of clothing, marked "The Colebrook Clothing Co., Colebrook, N. H." The first plaintiff heard of it again, testified to by its assistant secretary and bookkeeper, was through a postal, dated and postmarked February 16, 1903, advising of the receipt by the defendant at its pier of "1 case clothing," consigned to the plaintiff. Upon personal inquiry at the pier, the same witness found that the case contained the missing goods, which he was told they had had a long time, since September, and that they had notified the plaintiff a number of times and received no answer. The goods were tendered and refused, because of the loss, which the witness said amounted to 50 per cent. of their value, by reason of the advance of the season toward spring — the garments being intended for winter wear. Upon the second trial — for the cause had been tried twice — and, by stipulation, the evidence, taken upon the first, was used upon

Digitized by Google

the second trial, whereon were adduced, on both sides, new evidence important in several particulars — upon the second trial, the same witness said that the goods would be worth 20 per cent. more in January, on December fifteenth, pretty near their full value, and, on December first, the full value, showing in effect, that if the defendant, the carrier, did all that was incumbent upon it, by or before December first, the plaintiff had no cause of action, for the damages of the plaintiff, if any, would be the difference in the value of the merchandise at the time and place it ought to have been delivered and at the time of its delivery or tender. Ward v. N. Y. C. R. R. Co., 47 N. Y. 32. In extension of the rule, that it is the duty of the carrier not only to transport the goods but also to deliver the goods or equivalently give the consignee timely notice of their arrival, plaintiff's counsel contends, in effect, that such notice must be conveyed by messenger to the consignee, citing Solomon v. Philadelphia & N. Y. Ex. Co., 2 Daly, 104, decided in 1867. This doctrine, the defendant met by proving a rule more efficient than judicial speculation, the local custom, commonly recognized both by merchants and others, so reasonable and well known as to be considered a part of the agreement of transportation, that such notification shall be made through the machinery of the postal service, commonly more effective and reliable than any system of messengers, made by postals, open to perusal without breaking the cover. Evidence of three such notifications, on the part of the defendant, during the first fourteen days of October was given by a clerk, who testified to the contents of the notices, one directed by another and two by himself, written in a printed form printed upon postals, correctly addressed to the plaintiff at 714 Broadway, New York city, its place of business, and then mailing in the letter box at the corner of South and Pike streets. On cross-examination, this evidence was not shaken, but strengthened. The presumption attending such evidence was not rebutted by the simple statement of the assistant secretary and bookkeeper that he never received the postals. This evidence the learned court below might not disregard, as it evidently

Digitized by Google

did. For that error, without consideration of other objections and exceptions urged by the defendant, the judgment appealed from should be reversed.

FREEDMAN, P. J., and SCOTT, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

MAX JOKINISKY, Respondent, *v.* LOUIS MILLER, Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Summary proceedings — Defects in an instrument alleged to be a lease.

A memorandum, written on a card, signed by the landlord only, and reading "New York, April 15, 1901. I hereby lease the stoop floor at 174 Orchard St. south side to Mr. Miller from 1901 to May 1st, 1905, for the sum of $17. per month" can be called a lease under the doctrine that one who has delivered a contract, subscribed by himself, is estopped from denying that it was well executed, the instrument is insufficient to support dispossession proceedings by the assignee of the landlord, for, being for a period exceeding three years, it would be a "conveyance" within section 240 of the Real Property Law, would require record under section 241 thereof and could not be recorded because unacknowledged.

APPEAL by the tenant from a final order of the Municipal Court of the city of New York, fourth district, borough of Manhattan, in summary proceedings, in favor of the landlord.

Leopold W. Harburger, for appellant.

Louis Levene, for respondent.

MACLEAN, J. In answer to the petition of the plaintiff, the owner of certain premises, that defendant be dispossessed of a portion thereof, wherein he continued after the expiration, as alleged, of his monthly tenancy, the defendant set up a general denial, excepting as to continuance in possession, and on the trial introduced in evidence a card upon which was written:

Digitized by Google

"NEW YORK, *April* 15, 1901.

"I hereby lease the stoop floor at 174 Orchard St. south side to Mr. Miller from 1901 to May 1st, 1905 for the sum of $17. per month.

"A. GREENSPAN."

Upon that Miller claimed to be in possession as a lessee from the plaintiff's vendor, Greenspan, who testified that he had given this paper, and that he had told the plaintiff, his vendee, that Miller was in under a lease. That he had been so told, or had any such information, the petitioning landlord denied. The learned justice evidently disregarded the story of personal notice and found the petitioner a purchaser in good faith and for a valuable consideration. If this memorandum, signed by the landlord only, be called a lease on the doctrine that one who has delivered a contract subscribed by himself, is estopped from denying that it was well executed, it still is insufficient to support the defendant, for, being for a period exceeding three years, it would be a "conveyance," and require record, which might not be of this unacknowledged paper. Real Prop. Law, §§ 240, 241. The final order should be affirmed.

FREEDMAN, P. J., and SCOTT, J., concur.

Final order affirmed, with costs and disbursements.

JACOB FLEISHAUER and JULIUS FLEISHAUER, Respondents, *v.* EUGENE C. BELL, Appellant.

(Supreme Court, Appellate Term, June, 1904.)

Summary proceedings — Maintainable although the lease provides for a re-entry.

The contention, that where a lease provides for re-entry summary proceedings for non-payment of rent cannot be maintained by the landlord, is without basis in law.

APPEAL by the tenant from the final order of the Municipal Court of the city of New York, thirteenth district,

Digitized by Google

borough of Manhattan, awarding possession of the premises to the landlords in summary proceedings for the tenant's nonpayment of rent.

Rosenthal & Brown, for appellant.

Wasserman & Jacobus, for respondents.

MacLean, J. The final order herein, in summary proceedings for nonpayment of rent, was proper, for at the time the proceedings were instituted there was at least a balance due and unpaid. The contention, that summary proceedings for nonpayment of rent may not be maintained by a landlord when the lease provides for re-entry, is without basis in law, for the case of McMahon v. Howe, 40 Misc. Rep. 546, so holding, has incorrectly interpreted the Court of Appeals, in Michaels v. Fishel, 169 N. Y. 381, wherein it was determined merely that ejectment is the proper action for re-entry, when the lease provides for re-entry and reletting, if possession and right to a deficiency from reletting on account are sought, but if possession is acquired by means of summary proceedings, the lease, and so the relation of landlord and tenant, is terminated and the right to relet on account is lost. The final order must be affirmed.

Freedman, P. J., and Scott, J., concur.

Final order affirmed, with costs.

Harry Mendoza, Appellant, *v.* Joseph Rose, Respondent.

(Supreme Court, Appellate Term, June, 1904.)

Betting and gaming — The right of a loser to recover, as for money had and received, money lost on a bet, is given by I R. S., m. p. 662, §§ 8 and 9, still survives, and has not been affected by section 17 of the Percy-Gray Racing Law of 1895.

The provisions of the so-called Percy-Gray Racing Law (L. 1895, ch. 570, § 17) imposing upon a person, making a bet or wager on race courses subject to that act, liability to a civil action by the person betting with him for the amount of the bet — which

Digitized by Google

liability is therein expressly denominated a penalty and exclusive of all other penalties prescribed by law for the acts specified in the section — did not impliedly repeal sections 8 and 9, I R. S., m. p. 662, declaring unlawful all wagers etc., depending on any race, and giving the loser etc. of any money etc., placed on any wager or bet therein prohibited, an action to recover of the owner etc. the money paid etc., whether or not the wager was lost.

The remedy of the Revised Statutes still survives and is maintainable in the form of an action for money had and received.

The action is in its nature remedial and not penal and therefore need not be brought in the county where the cause of action arose, as would be the case under Code Civ. Pro., § 983, were the action one to recover a statutory penalty.

Where the bet is made on a race course not subject to the Percy-Gray Law, section 17 of that law can afford the defendant no defense upon the ground of an implied repeal effected thereby of the remedy under the Revised Statutes.

APPEAL taken by the plaintiff-appellant from a judgment rendered in the Municipal Court of the city of New York, sixth district, borough of Manhattan, dismissing the plaintiff's complaint upon the defendant's motion.

Martin Dolphin (Joseph Folliard Perdue, of counsel), for appellant.

Nicoll, Anable & Lindsay (De Lancey Nicoll and Archibald R. Watson, of counsel), for respondent.

SCOTT, J. The plaintiff, having bet $100 upon a horse race and lost, sues to recover back his money. His action was dismissed upon the ground that it was to recover a penalty or forfeiture imposed by statute and, therefore, under section 983 of the Code of Civil Procedure, should have been brought in Kings county, wherein the cause of action arose. This disposition of the case was made upon the theory that the plaintiff's only right to recover was to be found in section 17 of chapter 570 of the Laws of 1895, commonly known as the Percy-Gray Racing Law, which imposes upon a person, making or recording a bet or wager upon certain race courses, liability to a civil action, at the

Digitized by Google

hands of the person betting with him, for the amount of the wager, which liability is expressly denominated a penalty, and is declared to be exclusive of all other penalties prescribed by law for the acts specified in the section. If, as the respondent insists, the only right to recover a sum staked upon a horse race is to be found in the section cited, it is clear that the action is for a penalty and that the decision below was right. The appellant, on the other hand, maintains that he still has the right to sue under sections 8 and 9, 1 Revised Statutes, 662 (1 Birdseye's Stat. [3d ed.] 299, 300), which read as follows:

"Section 8. All wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or thing in action so wagered, bet or staked, shall be void.

"Section 9. Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet herein prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over to such stakeholder or not, and whether any such wager be lost or not."

These sections have never been expressly repealed, but the respondent's contention is that they have been impliedly repealed by so much of section 17 of the act of 1895, as provides that the penalty therein specified shall be exclusive of all other penalties. Whether this position is well taken, or not, depends upon the question whether or not the remedy given by the Revised Statutes is in the nature of a penalty, or of a recovery upon a *quasi*-contract. This very question was presented to, and passed upon by, the Court of Appeals in Meech v. Stoner, 19 N. Y. 26. In that action, which was for money lost in gaming, the plaintiff was an assignee of the loser, and the defendant relied upon the nonassignability of the cause of action. The plea was rejected, the court hold-

Digitized by Google

ing that the loser's right of action rested upon the illegality of the transaction by which the loser's money passed into the possession of the winner, and the absence of any just or legal title in the defendant to the thing or money in controversy. And it was pointed out quite clearly that the section authorizing an action to be brought did not create the right to recover, but merely removed the bar which otherwise would have been found in the application of the maxim "*In pari delicto potior est conditio defendentis.*" The court cites and relies upon a number of English cases, decided under the statute of 9 Anne (from which the section of our Revised Statutes is copied), in all of which it was held that the statute was remedial, not penal, and that the right of action rested upon the plaintiff's continued ownership of the title to the money or property wagered, notwithstanding its delivery or payment over to a stakeholder or the other party to the bet. As further illustrating the distinction between the recovery of the money by the loser as a remedy, and its recovery by the overseers of the poor, in case the loser does not sue within three months as permitted under section 15 of the same statute, the court points out that the latter action is not for the same cause as the other but is for a penalty intended to repress the vice of gambling. Weyburn v. White, 22 Barb. 82, relied upon by the appellant, was necessarily overruled by Meech v. Stoner. The right of action, provided in section 17 of the act of 1895, is evidently and essentially punitive in its nature. By its very terms it imposes a penalty for doing a forbidden thing, and what it seeks, or professes to seek, to accomplish is to provide a punishment for the wrong done to the people of the State by a violation of its laws, quite a different thing from the wrong done to the individual by the acquisition of his property through unlawful means. There is nothing opposed to this view in People ex rel. Sturgis v. Fallon, 152 N. Y. 1. It is true that, in the opinion in that case, the learned judge, who wrote for the court, said that the action authorized by section 17 was the "exclusive remedy" for the acts specified in that section, but a careful reading of the opinion will readily show that he was considering only

Digitized by Google

the public offense involved in the commission of those acts, for in the very next sentence he speaks of the acts of the relator as being "punishable" only in the manner prescribed by section 17. Our conclusion is that the right of a loser upon a betting contract to recover the sum lost, in an action as for money had and received, still survives, and is in no wise affected by section 17 of the act of 1895. If so, this action was not for a penalty and could properly be brought in the county of New York.

For another reason the judgment must be reversed. The cause was dismissed upon the pleadings, before any testimony had been offered. Section 17 of the act of 1895 does not apply to every race course in the State, but only to wagers made "upon any race course authorized by or entitled to the benefits of" the act. The preceding sections of the act contain elaborate provisions as to how corporations or associations may become entitled to those benefits. Certainly, as to a bet made elsewhere than upon such a race course, section 17 of the act had no application, and, therefore, could not be held to have repealed, by implication, the sections quoted from the Revised Statutes, which are general in their scope and apply to all wagering contracts. Neither in the complaint nor answer is there any allegation that the bet upon which the action was based was made upon a race course authorized by or entitled to the benefits of the act of 1895. There was, consequently, nothing before the justice to show that section 17 of that act applied to the case.

The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Digitized by Google

PAUL B. POUGH & Co., Respondent, *v.* RUDOLPH I. A. CERIMEDO et al., Appellants.

(Supreme Court, Appellate Term, June, 1904.)

Municipal Court of the city of New York — Time for ordering a bill of particulars not limited to that of joining issue.

The power of the Municipal Court of the city of New York to order service of a bill of particulars is no longer governed by Code Civ. Pro., § 2942, but by section 145 of the Municipal Court Act of 1902, which section, unlike the Code section, does not limit the time for making such an order to the time of joining issue.

APPEAL by the defendants from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, twelfth district, borough of Manhattan.

Donald F. Ayres, for appellants.

Hugo S. Mack, for respondent.

SCOTT, J. Section 2942 of the Code of Civil Procedure applies primarily to justices' courts. Its application to the former district courts of the city of New York and the present Municipal Court depended entirely upon the operation and effect of section 1347 of the Consolidation Act (Laws of 1882, chap. 410). This last section was expressly repealed by section 364 of the Municipal Court Act (Laws of 1902, chap. 580). It follows that the power of the Municipal Court to direct the service of bills of particulars is no longer governed by section 2942 of the Code, but by section 145 of the Municipal Court Act, which, unlike section 2942 of the Code, does not limit the time for making an order for a bill of particulars to the time of joining issue. The time afforded by the justice was rather short but no objection was made by defendants on that score. The allegations of the answer do not correspond with the terms of the written lease. The plaintiff did not agree to "give entire possession and control of the premises fully completed on the 15th day of October,

Digitized by Google

1903, if possible, but not later than the 2nd of November." All that plaintiff agreed to was to give possession of the premises on the dates specified, but the lease is entirely silent as to how far they should then be completed. The term demised by the lease was not to begin until January fifteenth, and the only obligation as to preparedness assumed by plaintiff was the implied one that the premises should then be completed and ready for occupancy.

The appeal appears to be without merit and the judgment must be affirmed, with costs.

FREEDMAN, P. J., and MACLEAN, J., concur.

Judgment affirmed, with costs.

Matter of the Application of JAMES F. BREARTON, for an Order Directing CHARLES HAGEN to Deliver Books or Papers in His Possession or under His Control Belonging to the CITY CLERK AND CLERK OF THE COMMON COUNCIL OF THE CITY OF TROY.

(Supreme Court, Albany Special Term, July, 1904.)

Proceeding under Code Civ. Pro., § 2471a, by one elected to an office to obtain possession of its books and papers from the former incumbent holding over the term — Prima facie title in the person elected sufficient — When such title exists in one claiming as city and common council clerk of the city of Troy — Definition of "viva voce" vote.

While the court, in a proceeding taken under Code Civ. Pro., § 2471a, by a person elected to an office to compel by order delivery to him of its books and papers withheld by a former incumbent holding over the term, will not try title to the office, a mere denial of title is insufficient to defeat the proceeding and the court will look into the matter far enough to determine whether the petitioner has a prima facie title.

Where it appears that he has received a certificate of election or appointment from the proper person or persons he has such title and is entitled to maintain the proceeding.

The fact that his title turns on difficult questions of law will not defeat his right.

In Troy, a city of the second class, subject to L. 1898, ch. 182,

Digitized by Google

and having a common council of seventeen members, a majority thereof constitutes a quorum and a majority of the quorum may elect a clerk of the common council and of the city.

A person who, all members of the council being present when a regular meeting thereof was called to order, received for such offices a majority of the votes cast when nine members of the council were still present at the meeting, who received and duly filed a certificate of his election executed by the president of the common council, the former incumbent refusing to issue one, and who duly filed his oath of office, must be deemed to have prima facie title to the offices and may maintain a proceeding to compel the former incumbent to deliver him the books and papers.

The provision of the thirty-third section of the said act of 1898 that "All appointments or designations made by the common council shall be by *viva voce* vote" does not necessarily mean that each member must orally announce his choice and when a nomination is made either by a written resolution or oral motion and each member announces his vote for or against it by his voice, the vote is *viva voce*.

PROCEEDING to compel the delivery of books and papers to a public officer under section 2471a of the Code of Civil Procedure.

Section 15 of chapter 182 of the Laws of 1898, being an act for the government of the cities of the second class, provides as follows: "The common council shall choose a clerk, to hold office during the term for which its members were elected, unless sooner removed by vote of three-fourths of all the members of the common council."

At a regular meeting of the common council of the city of Troy, held on the 2d day of January, 1902, Charles Hagen was chosen city clerk and clerk of the common council of the city of Troy and immediately entered upon the discharge of his duties as such.

At the general election held in the city of Troy on the 3d day of November, 1903, a common council was elected, consisting of seventeen aldermen. The new common council met for organization on the 2d day of January, 1904, but failed to choose a clerk. Various meetings of the common council were thereafter held and attempts made to choose a clerk, but none was chosen. Under the provisions of section 5 of chapter 681 of the Laws of 1892, known as the Public Officers

Digitized by Google

Law, the said Charles Hagen held over in such office of clerk of the common council, and continued to discharge the duties thereof pending the election of a successor.

At a meeting of the common council held on the 19th day of May, 1904, the president and seventeen aldermen were present. A portion of the minutes of the meeting reads as follows:

"Alderman Fogarty nominated James F. Brearton for clerk.

"Alderman McMurray nominated John T. Graham.

"Alderman Casey nominated Joseph A. Corr.

"Several aldermen left the meeting.

"The vote resulted as follows: Brearton — Aldermen Cahill, Donnelly, Fogarty, Malone, Morrissey, O'Neil — 6.

"Graham — Alderman McMurray — 1.

"Corr — Aldermen Casey, Luby — 2.

"There being no quorum, the meeting adjourned.

"CHARLES HAGEN,

"City Clerk and Clerk of the Common Council."

On the second of June a meeting of the common council was held, at which there were present, at the beginning thereof, the president and seventeen aldermen. At the beginning of this meeting the president declared the first business in order to be the election of a clerk. James F. Brearton was nominated for clerk, then a motion was made to lay the matter on the table until later in the evening, which was adopted, and later in the evening Mr. Brearton was again nominated for clerk. A motion was made to lay the matter on the table until the first meeting in October. The president declared the motion out of order. One of the aldermen appealed from the decision of the chair, and the president refused to entertain the appeal. An alderman then moved to adjourn. The president declared the motion out of order and refused to state it to the council. It was again moved by an alderman that Mr. Brearton be elected clerk. Alderman Casey amended the motion to lay the matter on the table. The president declared the motion out of order. Alderman McMurray nominated F. E. Draper, Jr. Alderman Casey

Digitized by Google

nominated Joseph A. Corr. Alderman Cahill called for a vote on his motion to elect James F. Brearton, clerk. The printed minutes of the proceeding of the common council then read as follows:

"The president directed a roll-call.

"At this point several aldermen left the chamber.

"The roll-call resulted as follows:

"Ayes — Aldermen Cahill, Donnelly, Fogarty, Luby, Malone, Morrissey, O'Neil — 7.

"Noes — McMurray — 1.

"The president declared James F. Brearton elected clerk.

"The president then declared the meeting adjourned.

"CHARLES HAGEN,

"City Clerk and Clerk of the Common Council."

It is admitted that Alderman Casey was present in the common council chamber when this vote was taken but did not vote.

At the following meeting of the common council motions were made to correct the minutes so that they should read, after stating the vote upon the resolution to elect a clerk, as follows: "It appearing by the roll-call that there was not a quorum present and voting there was no election and the meeting thereupon adjourned," instead of "The president declared James F. Brearton elected clerk. The president then declared the meeting adjourned," as appears in the original printed minutes of the meeting of June second. The motion to so correct the minutes failed of passage, and this last meeting of the common council adjourned without either correcting or adopting the minutes of the previous meeting.

On the 2d day of June, 1904, the president of the common council signed and delivered to Mr. Brearton the following certificate: "This is to certify that James F. Brearton was duly and regularly chosen City Clerk and Clerk to the Common Council of the city of Troy at a regular meeting of the Common Council held this day, and said James F. Brearton was by me duly declared to be so chosen at said meeting.

"Dated, Troy, N. Y., June 2, 1904.

"THOMAS F. DOUGHERTY,

"President of the Common Council of the City of Troy."

Digitized by Google

On the 4th of June, 1904, Mr. Brearton filed and left with Charles Hagen to be filed in the city clerk's office his constitutional oath of office as city clerk and clerk of the common council, at the same time making a written demand upon him for all the books, papers and documents and public records in his possession as city clerk and all property in his possession as city clerk and the keys of the city clerk's office, together with the original minutes of the common council meeting of June 2, 1904.

In a letter dated June 3, 1904, and signed by him, the said James F. Brearton demanded of Charles Hagen that he issue to him a certificate of his election to the office of city clerk and clerk of the common council of the city of Troy. In response thereto Mr. Hagen said he knew of no such certificate, and so far as he knew it was not the custom to give one, and that he did not receive one when he was chosen city clerk.

June 10, 1904, the petitioner filed with the county clerk of Rensselaer county a duplicate original of the constitutional oath taken June 3, 1904, and filed in said city clerk's office as before stated.

There is no law requiring the city clerk or clerk of the common council to give an undertaking.

Section 17 of chapter 182 of the Laws of 1898, being an act for the government of the cities of the second class, reads as follows: "The common council shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its members. Its meetings shall be public and its records open to public inspection, and, except as herein provided, the majority of all its members shall be a quorum for the transaction of business. The passage of an ordinance, unless otherwise herein provided, shall require the affirmative vote of at least a majority of all its members."

Section 19 provides that no ordinance shall be passed the same day upon which it is introduced, except by unanimous consent; that no appropriation of money shall be made except by an ordinance passed by three-fourths of all the members; that no ordinance shall be passed making or authorizing a sale or lease of real estate, or of any franchise except by three-

Digitized by Google

fourths vote of all the members of the common council. There are other provisions in the act requiring more than a majority vote of the common council for specific acts of such council.

Sections 33 of said act reads as follows: "All appointments or designations made by the common council shall be by viva voce vote."

Section 2 of the rules of order adopted by the common council reads as follows: "Upon the appearance of ten members, the Common Council shall be called to order by the President, or if he be absent, by the President Pro Tempore appointed by the board."

James F. Brearton, in person (William J. Roche, of counsel), for motion.

Lewis E. Griffith, opposed.

HERRICK, J. This is a proceeding under section 2471a of the Code of Civil Procedure.

It is not a proceeding to try title to office. Matter of Foley, 8 Misc. Rep. 196; Matter of Sells, 15 App. Div. 571; Matter of Dudley, 33 App. Div. 465; Matter of Bradley, 141 N. Y. 527; Matter of Brenner, 67 App. Div. 375; 170 N. Y. 185.

And while the court will not in these proceedings try title to office, but put the petitioner to his action, still a mere denial by the defendant of the petitioner's title is not sufficient to defeat the proceedings; the court will look far enough into the matter to ascertain whether the petitioner has a *prima facie* title to the office.

Ordinarily appointments, or election to office, are evidenced by certificates of appointment, or certificates of election, issued by the official making the appointment or by the officials charged with verifying or conducting the election, so that where it appears in a proceeding of this kind that a person claiming office has received a certificate of election, or appointment from the proper person or persons, it is held that he has a *prima facie* title to the office, and is entitled to an order for the possession of the books and papers pertaining to that office. Matter of Foley, 8 Misc. Rep. 196; Matter of Brenner, 67 App. Div. 375; 170 N. Y. 185.

Digitized by Google

And it has been held that where such a certificate is produced the former incumbent of the office cannot go into questions underlying the election and which he may allege as invalidating it. Matter of Bradley, 141 N. Y. 527–530.

It has been said that it is "well settled that the statute cannot be successfully invoked unless the title of the applicant is clear and free from reasonable doubt." Matter of Brenner, 67 App. Div. 375–377.

Public policy requires that controversies of this character be speedily determined, and for that reason the summary remedy provided by the Code was devised.

The fact that the petitioner's title to office turns upon questions of law, and those difficult of solution, will not defeat his right to the order. When the only question is one of law, it can just as well be decided in these proceedings as in any other, and the court will not compel the party to resort to an action, which may not be ended until his term of office has expired, to determine merely a question of law.

The Matter of Brenner was one that depended entirely upon the solution of a legal question, and not a question of fact; that that question was not entirely clear and not easy of solution is evidenced by the fact that there was a sharp division in the Court of Appeals, two judges thereof dissenting from the decision.

It is only when upon the facts his *prima facie* title is not "clear and free from reasonable doubt" that the petitioner will be denied the remedy provided for by section 2471a, and put to his action to settle the question of fact. Here it seems to me that the facts show the *prima facie* title of the petitioner to be "clear and free from reasonable doubt."

The petitioner produces the certificate of the president of the common council that he was duly chosen clerk thereof. The sufficiency of that certificate is challenged.

It is said that the office of president of the common council is a purely statutory office, with limited powers and duties, and those specifically defined, and that nowhere is he given power to authenticate, or certify to, the acts or proceedings of the common council.

The city clerk is the official charged with keeping the

Digitized by Google

record of the proceedings of the common council. Section 15, chapter 182, Laws of 1898. And ordinarily the person charged with keeping a record of proceedings is the one to certify to them.

In this case the person so charged is the defendant, and upon being applied to by the petitioner for a certificate, declined to give him one.

The petitioner then has produced the certificate of the only officer of the common council who would provide one; the other officer in a position to certify to the proceedings is his adversary.

It would be a travesty upon justice to hold that the petitioner's right to maintain this proceeding can be defeated because his adversary has refused to issue to him a certificate of the proceedings of the common council, at which it is claimed he was elected. If it was his duty to furnish it, then he cannot assert his failure to perform his duty, to defeat the plaintiff's proceeding against him.

But I have not been referred to any provision of law, nor have I been able upon my own investigation to find one, that requires the issuing of any certificate of the election of a clerk of the common council.

The statute is silent as to how his election shall be authenticated. No commission, or certificate of election, or appointment is provided for, and where none is provided for none is required.

While the courts have held as above stated, that, where an applicant comes with a certificate of appointment, or election, from the proper officer, and has taken his oath of office, and filed an undertaking, where one is required, he has established a *prima facie* title to the office, and is entitled to an order for the possession of the books and papers pertaining to such office, it has never been held that that is the only evidence of title to office which will entitle him to maintain the proceedings.

Where the undisputed facts in the case make out a *prima facie* title to office, then, even although no certificate of appointment or election is produced, the order will issue. Where no certificate of election is provided for by law, it is

Digitized by Google

evident that such election or appointment may and indeed must be authenticated to the court in some other manner. In this case there are some undisputed facts, to wit: That the number of the common council of the city of Troy is seventeen; that at a regular meeting held on the 19th day of May, 1904, the president and seventeen aldermen were present; that a number of the members left the meeting. That thereafter a vote was taken upon the election of clerk, and six aldermen voted for Mr. Brearton, and three other aldermen voted for other candidates, nine voting in all upon the question of the election of clerk. That at a regular meeting held on the second of June the president and seventeen aldermen were present. That during the meeting a number of the aldermen left the common council chamber. That thereafter seven aldermen voted for Mr. Brearton for the office of clerk, one alderman voting against electing him clerk, and one other alderman being present did not vote, nine aldermen, therefore, being present at the time Mr. Brearton received seven votes for the office of clerk, and being thereupon declared elected to such office by the president of the common council. What is the legal conclusion from these undisputed facts?

The statute governing the city of Troy, provides as follows: "The common council shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its members. Its meetings shall be public and its records open to public inspection, and, except as herein provided, the majority of all its members shall be a quorum for the transaction of business. The passage of an ordinance, unless otherwise herein provided, shall require the affirmative vote of at least a majority of all its members." Laws of 1898, chap. 182, § 17.

Section 2 of the rules of order adopted by the common council reads as follows: "Upon the appearance of ten members, the Common Council shall be called to order by the President, or if he be absent, by the President Pro Tempore appointed by the board."

The construction heretofore placed upon this provision of the statute, coupled with the rule, by the common council, and apparently by the city officials, is, that it requires ten

Digitized by Google

members of the common council to transact business. It was in accordance with that construction that it was announced that no quorum was present when the vote was taken for city clerk upon May nineteenth, when nine members were present.

And that construction is now contended for by the defendant in these proceedings.

Of course the common council can make no valid rules that are in conflict with the statute.

It is contended, however, that the words, "except as herein provided," means, not only as provided in the statute, but also as may be provided for in the rules of procedure adopted by the common council, by virtue of the preceding clause of the section.

That does not seem to me the proper construction to be given to those words. It hardly seems probable that the Legislature, after providing in the act for one thing, should in the same act provide that the common council might by its rules nullify that provision. The words in question refer, I think, to the whole act. As we have seen in the statement of facts herein, there are other provisions of the statute requiring more than a majority vote for their adoption by the common council, and the exception mentioned in section 17 obviously refers to the last clause of the section itself, and to the other express provisions of the statute requiring more than a majority vote for the doing of the things specified in such provisions.

Furthermore, the reading of the statute is that "The common council shall determine the rules of its own proceedings."

That is the method and manner of doing business, how it shall proceed. Not who shall do business. Not who shall proceed. Not who shall constitute the common council. The individual aldermen do not constitute the common council, it is only when they are regularly convened in sufficient numbers that they constitute the common council, and the Legislature has said what that number shall be to constitute the common council. A quorum is the common council.

What shall constitute the common council is a part of the fundamental law of the city. A part of its constitution. It

Digitized by Google

is determined by the creator, not by the creature. To the creature is left the making of its rules of procedure, after it has come into being, under the statute.

I conclude, therefore, that the exception mentioned in the statute does not mean any exception that should be provided for by the rules of procedure adopted by the common council.

In addition it may be said that the rules do not in express terms provide what number shall constitute a quorum, or have power to transact business. The rule in question reads "Upon the appearance of ten members the Common Council shall be called to order," etc., and, therefore, is not in terms in conflict with the statute, although it is by implication.

In this case it appears that at the meetings of May nineteenth and June second, seventeen members were present when the meetings commenced, so that the rule was complied with. And nine were present upon each occasion when the vote was taken for the choice of a clerk. That constituted a quorum, and as such it had power to elect a clerk.

"The general rule of all parliamentary bodies is, that, when a quorum is present the act of the majority of the quorum is the act of the body." McFarland v. Crary, 6 Wend. 298; Sargeant v. Webster, 54 Mass. 497; Brown v. District of Columbia, 127 U. S. 579; United States v. Ballin, 144 id. 1.

"A quorum is, for all legal purposes, as much the body to which it appertains as if every member were present, and when a quorum has met an act of the majority of such quorum is an act of the body itself." 23 Am. & Eng. Encyc. of Law, 591.

It is claimed, however, that there was no election of clerk at the meeting held June second, because there were only eight votes cast, and that that was not a quorum. It is conceded, however, that there were nine present. A quorum being present it was not necessary that all or even a majority of those present should vote.

"When a part of the members present refuse to vote at all, a vote may be legally decided by a majority of those actually voting, though they do not constitute a majority of the whole number present. This rule rests upon the principle that

Digitized by Google

members present and not voting will be deemed to assent to the action of those who do vote." 23 Am. & Eng. Encyc. of Law, 592.

"Whenever electors are present, and don't vote at all, they virtually acquiesce in the election made by those who do." Sudbury v. Stearns, 38 Mass. 148–154.

"The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present." Attorney-General v. Shepard, 62 N. H. 383; approved, United States v. Ballin, 144 U. S. 9.

The defendant in these proceedings further contends that the election was illegal, because as he claims section 33 of chapter 182 of the Laws of 1898, requiring the election to be by *viva voce* vote, was not complied with.

His contention, as I understand it, is that each man should orally name his choice for clerk. It will be observed that that was done at the meeting of May nineteenth. While that is a compliance with the requirement, it is not the only way in which it can be satisfied.

The term "*viva voce*" when applied to elections is used in opposition or contradistinction to the ballot, and simply means that the voter shall declare himself by voice, instead of by ballot.

In this country, as a general rule, the people vote by ballot, so that their action may be secret, free and untrammeled; their representation, *viva voce,* so that their action may be public and known to their constituents. So that when a nomination is made either by written resolution or oral motion, and each person announces his vote for or against it by his voice, the vote is *viva voce.*

The manner of choosing a clerk in this case was left to the discretion of the common council, so long as the vote was *viva voce.*

It could have been done by calling the roll, and each member naming his choice, or by placing candidates in nomination, and then calling the roll of members, as was done at the meeting of May nineteenth, or by naming a candidate by resolution and calling the roll, and the members orally voting for or against it, as was done at the meeting of June second.

Digitized by Google

Any of these methods would be voting *viva voce*. The principle of public, not secret, voting would be complied with.

Complaint is made of the alleged arbitrary action of the president of the common council, in refusing to put motions, made by different aldermen, to the common council to be acted upon, particularly a motion to adjourn.

As we have seen in Matter of Bradley, 141 N. Y. 530, where the petitioner shows a *prima facie* title, the former incumbent will not, in these proceedings, be permitted to go into questions underlying the election and which he may allege invalidate it. So here it appearing that a majority of those entitled to choose a clerk have voted for the petitioner, the court will not, in this proceeding, inquire into what preceded the vote upon that question.

There is no complaint of any arbitrary or improper action at the meeting of May nineteenth, and it does not appear that any votes were forced in favor of the petitioner by the action of the president at the meeting held June second.

It may not be out of place to say that the way to check or defeat the arbitrary action of a presiding officer is not to run away from the meeting, unless in sufficient numbers to leave the meeting without a quorum. The orderly way, the only safe way, as this proceeding demonstrates, is not to abandon the meeting, but to contest the alleged arbitrary action by legal and parliamentary methods.

The majority can always rule; if temporarily overridden by arbitrary action, the courts will rectify the wrong and enforce its right.

It appearing then from the undisputed facts in the case, that at the meetings of May nineteenth and June second, when there were a sufficient number of aldermen present to constitute a quorum, and, therefore, to constitute a common council, a majority of those present upon each occasion voted *viva voce* for the election of James F. Brearton as city clerk and clerk of the common council, it must be held that a *prima facie* title to that office is established in his favor, and that the order prayed for should be granted, with costs of these proceedings. Let an order be entered accordingly.

Ordered accordingly.

Digitized by Google

WILBUR R. HITCHCOCK, Plaintiff, v. BARNEY RILEY, Defendant.

(Supreme Court, Franklin Trial Term, July, 1904.)

Negligence — Right of a farmer to clear his lands by the use of fire — When he has not been negligent and is not liable to a third person, whose property was burned because the fire caught on an intervening lot and was carried therefrom over to the lot of the third person — Recovery in such case predicated on the fire being the direct cause of the loss.

It is lawful for the owner of farm land to use fire in clearing it and he need exercise only ordinary care to prevent the fire from injuring the property of another.

Where a farmer, on and prior to the middle of April and after considerable rains, sets fires in stumps on his lands plowed, to be plowed and to be planted to potatoes, and at the end of the month a gale of wind, suddenly arising, sweeps the fires on from the stumps to the adjoining lot of another person, and because that lot contains much dry material, the efforts of the farmer and others wholly to extinguish the fire on that lot, although assisted by a lull in the gale, are not wholly successful, and the fire, by a revival of the gale, is suddenly blown on a lot second removed and belonging to a third person and ignites his wood pile situated thereon, there is no evidence of negligence in the farmer sufficient to make him liable to the third person for the value of the wood burned.

The third person must prove, to recover on such a state of facts that the farmer negligently set or maintained on his lands a fire and that it directly communicated the fire to the wood pile.

ACTION of negligence. Motion to set aside the verdict and for a new trial.

H. B. Chase (J. P. Kellas, of counsel), for plaintiff.

Badger & Cantwell, for defendant.

KELLOGG, JOHN M., J. On and prior to the 15th day of April, 1903, the defendant set fire to certain stumps in two places upon his premises, one place northerly from the creek where the fallow had been burned the year before, the ground

Digitized by Google

plowed and potatoes raised, and another place south of the creek where he burned some stumps, piling the limbs, sticks and dry material upon them, and after the fires were set and the loose material picked up for the fire, he plowed and dragged this land and planted it to potatoes. These fires were set along his westerly line, which was about 192 rods from the plaintiff's woodpile, the woodpile being situated upon the easterly line of the Best lot, the westerly end of the woodpile being about eighty rods from the defendant's land. In March there had been considerable rain, and for the month preceding the fifteenth day of April about the usual amount of rain. A good rainfall took place April third, being one and 63/100ths inches. Between the fires set by the defendant and the Best lot was the defendant's pasture land upon which were various dry stumps. The land on the Best lot between the defendant's line and the woodpile had not been cut or pastured for two or three years, and there was a good deal of dry grass, weeds and other dry combustible material upon the ground.

The defendant worked from day to day upon his land, getting it ready for his crop, and observed the fire, and prior to the thirtieth day of April it had extended about twenty rods westerly from the plowed land toward the Best lot, but none of the fire was then within about fifty rods of the line between him and the Best lot. April thirtieth a westerly wind arose, increased in velocity, and became a gale toward night, carried the fire from stump to stump across the defendant's land, and from the stumps on his land into the dry and combustible material upon the Best lot, and from stump to stump on the Best lot, and ignited a small pile of wood in the railroad right of way easterly of the Best lot, and was burning at different times and at different places all over the Best lot. When the defendant saw the fire spreading by the gale, he did everything that he could do to arrest its progress, and he and the railroad employees worked hard to keep the fire from running from the small pile of wood upon the railroad right of way into the plaintiff's wood. The fence between the wood piles was afire several times, and was put out, and by digging ditches and throwing sand, all felt that no

Digitized by Google

further danger existed from the burning wood upon the right of way, or from the burning stumps upon the Best lot. At this time the loose material had burned from the Best lot, and the only fires then existing were in the stumps on the defendant's land and on the Best lot, and the woodpile on the railroad right of way.

After the wind had died down materially, and all felt that the plaintiff's wood was safe, it again raised to a gale, and the fire from the stumps on the Best lot, or from the burning pile of wood upon the right of way, or from the burning stumps upon the defendant's land, caused the plaintiff's wood to burn. The court instructed the jury that if the plaintiff's wood was burned by fire communicated from the woodpile on the right of way, there could be no recovery, and left them to determine how it occurred. This verdict, therefore, establishes that it did not communicate from the right of way, but communicated from fire blown from the burning stumps on the Best lot, or the burning stumps on the defendant's land.

It is perfectly lawful and proper to use fire in clearing land, and the defendant had the absolute right to burn the stumps upon his land, and was only required to exercise ordinary reasonable care to see that thereby he did not injure some one else. When the fires were set it was not such a dry time that the jury could say that the defendant was negligent in setting them. If negligent at all, it was in allowing them to remain after April fifteenth, and after it was apparent that it was a settled dry time. It will be observed that when set the fires were confined to the plowed land and the land in process of being plowed. A full and fair consideration of the evidence does not seem to show such negligence upon the part of the defendant as to make him liable for the injury done the plaintiff. McGibbon v. Baxter, 51 Hun, 587.

Undoubtedly the plaintiff's loss arises from the unusual gale of wind, and from the dry and combustible matter allowed to remain upon the Best lot, for neither of which was the defendant at all responsible. The owner of the Best lot and the plaintiff were as much chargeable with knowledge of the dry material upon the Best lot as the defendant, and he was not prevented from burning the land because his neigh-

Digitized by Google

bors allowed dry and combustible material on their premises. The whole situation called for ordinary care under all the circumstances, both by the defendant and by his neighbors. It would not seem that the natural and proximate result of the burning of the stumps on the defendant's land would be the communication of fire to the plaintiff's wood at so great a distance. But the plaintiff's injury comes from the intervening causes, to wit, the unexpected gale of wind, and the combustible material upon the Best lot. I think, therefore, the verdict is against the weight of evidence, and that there is not sufficient evidence of the defendant's negligence upon which to found a recovery. Moreover, if the defendant's negligence is conceded, his liability only exists to the party to whom he next immediately communicated the fire. It is not a question of boundaries, farms or lot lines, but the question whether the defendant's negligent fire was the direct cause of the plaintiff's loss. If we say that all of the fire on the defendant's land was a negligent fire, then he might be held liable for any injury he did the next adjoining party, namely, Best. But the injury to the plaintiff was caused (if not from the fire in the woodpile on the railroad right of way) by the fire running through the Best lot and on account of the combustible nature of the material upon it, and by the gale of wind bearing the sparks from the property of Best to the property of the plaintiff.

That it is not a question of boundary lines or farms, but of the proximate and direct cause, is shown by the Ryan case, 35 N. Y. 210, where the fire carelessly escaping from the locomotive burned the defendant's sheds upon its lands, and the sparks from the sheds burned the plaintiff's house, and it was held that the plaintiff's loss came from the burning of the shed and not from careless management or defects in the engine.

In the Frace case, 143 N. Y. 182, the plaintiff's barn and hotel were burned, and the court charged the jury that to recover for the burning of both it must appear that each was destroyed by reason of the fire communicating directly from the engine without the assistance of other agencies, or arising from any other cause.

Digitized by Google

Hoffman v. King, 160 N. Y. 618, and Van Inwegen v. Port Jervis, M. & N. Y. R. R. Co., 165 id. 625, also hold that the plaintiff, in order to recover, must show that his fire was caused directly and not indirectly from defendant's fire. In order to recover in this case the plaintiff must establish two propositions: (1) That the defendant negligently set or maintained a fire upon his land, and (2) That the negligent fire upon his land communicated directly the fire to the plaintiff's wood.

It will not do if the fire set by the defendant was carried by the gale from stump to stump upon his land and thus communicated to the stumps on the Best lot, and from stump to stump on the Best lot was communicated to the plaintiff's wood. But, as I view the authorities, a recovery can only be sustained by showing that the sparks from the defendant's land were carried through the air without any intervening cause, and lighted upon and caused the plaintiff's wood to burn. The charge in this respect was probably misleading. If the fire and the wind were sufficient to carry the sparks directly from defendant's land over on to the plaintiff's woodpile, it is very doubtful, considering the distance, the manner in which the fire was carried by the gale across the defendant's land and the Best lot, if the plaintiff's loss would be the proximate result of the fire and one of the results which an ordinary prudent man could or ought to have foreseen as liable to happen. These questions can be more fully considered upon another trial. It is sufficient to set aside the verdict as not fairly sustained by the evidence and to order a new trial, with costs to abide the event.

Ordered accordingly.

Digitized by Google

Matter of the Investigation of the Financial Affairs of The Town of Hadley.

(Supreme Court, Fulton Special Term, July, 1904.)

General Municipal Law, L. 1892, ch. 685 — Investigation of the financial affairs of a town — It is a "special proceeding" — How continuable where the officer before whom it was begun becomes disqualified.

A proceeding instituted by freeholders of a town for an investigation of its financial affairs, authorized by section 3 of the General Municipal Law (L. 1892, ch. 685), is a "special proceeding" within the definition of that term in the Code of Civil Procedure, and when begun in the county in which the town is situated before the only justice of the Supreme Court residing in that county may, upon his subsequent disqualification to hear the proceeding, be continued by virtue of Code Civ. Pro., § 52, before a justice of the Supreme Court residing in the adjoining county.

Application by twenty-five freeholders of the town of Hadley, for an investigation into the financial affairs of the town. Motion to continue before another justice.

C. S. Enches (T. W. McArthur, of counsel), for freeholders, for motion.

Charles G. Fryer, for Smith Roods, opposed.

Fred B. Bradley, for Cowles and Kathan, opposed.

Spencer, J. This is a proceeding instituted by twenty-five freeholders of the town of Hadley, Saratoga county, for an investigation into the financial affairs of the town. The authority for such an investigation is conferred by section 3 of the General Municipal Law. Laws of 1892, chap. 685. The petition was presented to Mr. Justice Houghton, who did not make the investigation, but by order appointed William T. Moore, as an expert, to perform that duty. The expert entered upon the discharge of his duties and made a report bearing date January 2, 1902. Thereafter the petitioners applied for confirmation and for an order direct-

Digitized by Google

ing the publishing of the report, and for the taxation of the expenses of the proceedings. This motion was heard by the justice, but before decision made, he was assigned to service upon the appellate bench of this court. The present application is a motion to continue the proceedings before me in the county of Fulton.

Certain officers of the town have appeared and objected to the hearing, on the ground that there is no authority in law for continuing the matter before another justice. Inasmuch as all the parties concede that Mr. Justice Houghton is disqualified, I shall assume that such is the case.

It has been held that a matter of this character falls within the definition of the term "special proceeding," as defined by the Code of Civil Procedure. People ex rel. Guibord v. Kellogg, 22 App. Div. 176; Matter of Town of Hempstead, 36 id. 321.

As there is nothing in the General Municipal Law which provides for continuing the matter before another justice in case of the disability of the justice before whom it was instituted, I am of the opinion that the proceedings must lapse unless authority for continuing the same is found in section 52 of the Code of Civil Procedure. I have not been referred to, nor have I been able to discover, any other provision of law which may be regarded as applicable.

It is earnestly contended by those opposing this motion, that the office of justice of the Supreme Court is not included within the provisions of the section, and that the officer referred to therein is only an officer of the county or of an adjoining county. I am of the opinion, however, that the language does not refer exclusively to county officers. The language of the statute is apparently satisfied by any officer having jurisdiction to act in the proceedings within the county wherein they are instituted; and if this be so, a continuance may be before the officer's successor or any other officer residing in the same county before whom it might have been originally instituted; or if no such officer resides in the county, or in case any such officer is disqualified, then before such officer residing in an adjoining county who would originally have had jurisdiction of the subject-matter

Digitized by Google

if it had occurred or existed in the county in which such officer resided.

The court may take judicial cognizance that Mr. Justice Houghton is the only justice of this court residing in the county of Saratoga. It is conceded that he is now disqualified. The justice before whom these proceedings are sought to be continued resides in Fulton county, a county adjoining that in which the proceedings were instituted, and thus seems to fulfill the express terms of the statute. It may be that in case no justice had resided in an adjoining county the proceedings would have lapsed for the reason that the statute does not provide for such a contingency, but as to that question, I express no opinion.

The preliminary objection is overruled. The motion will be heard upon the merits at the Special Term rooms in the city of Gloversville, Fulton county, at such time as may hereafter be agreed upon and as stipulated for at the time of the hearing of the preliminary objection.

Ordered accordingly.

THE PEOPLE ex rel. BERNHARD LEVY, Relator, *v.* HENRY H. PRESTON, Sheriff of Suffolk County et al., Respondents.

(Supreme Court, Kings Special Term for Motions, July, 1904.)

Crimes — Insufficiency of a complaint on information and belief for the issue by a magistrate of a warrant and for his holding an examination.

A complaint on information and belief is insufficient to confer jurisdiction upon a magistrate to issue a warrant of arrest or hold an examination of the charge.

HEARING on the return to writs of *habeas corpus* and *certiorari* to the sheriff of Suffolk County and George A. Buckingham, Justice of the Peace, respectively. The relator was arrested on a warrant issued by a Justice of the Peace on a charge of receiving stolen property, and committed to the county jail to await the action of the grand jury after an examination before the Justice.

Digitized by Google

Philip Cohen for relator.

Livingston Smith, District Attorney, for respondents.

GAYNOR, J.: The sworn complaint or deposition against the relator on which the Justice of the Peace issued the warrant on which he was arrested is on information and belief only, and therefore conferred no jurisdiction on the magistrate to issue the warrant (Matter of Blum, 9 Misc. Rep. 571).

It is contended, however, that the evidence taken before the magistrate on the examination after the arrest was sufficient to warrant his being held for the grand jury, and that therefore he was properly committed to await the grand jury. But the trouble is that the magistrate had no jurisdiction to hold such examination, and therefore all of his acts were void (People ex rel. Kingsley v. Pratt, 22 Hun, 300). The relator's counsel on being arraigned moved for the relator's discharge for the insufficiency of the complaint, but the motion was denied, and the magistrate held the relator for examination, which was subsequently had. There is therefore no claim that the relator gave jurisdiction by consent; but that, I suppose, would be impossible in the case of a mere magistrate, if it might be possible in the case of a court.

The relator is discharged.

GEORGE B. GURLEY, Plaintiff, v. MORITZ GRUENSTEIN, Defendant.

(Supreme Court, Kings Special Term for Motions, July, 1904.)

Attorney's lien — Not recoverable of the adversary if his own client is solvent.

Where the plaintiff in an action is solvent and able to pay his attorney he cannot recover the amount of his agreed lien of the defendant.

Digitized by Google

PETITION by the plaintiff's attorney to be permitted to issue execution on the judgment herein against the defendant in order to enforce his alleged lien thereon for one half thereof.

Charles S. Simpkins attorney in person.

Jacob Gordon for defendant.

GAYNOR, J.: The plaintiff recovered a judgment herein on July 8th, 1887, for $1,514.70. On June 4th, 1897, the parties settled by the payment of $100 to the plaintiff by the defendant in full of the judgment. At that time the defendant was insolvent. The plaintiff's attorney (the petitioner) had nothing to do with this settlement. He had an agreement for one half of whatever should be recovered in the action. He has been paid nothing by the plaintiff. There is no claim that the plaintiff is insolvent and unable to pay the attorney.

The plaintiff had the absolute right to settle the judgment with the defendant for whatever he could get, the defendant being insolvent. An attorney's lien is subject to this right of his client to settle (Pomeranz v. Marcus, 40 Misc. 442; Zimmer v. Metropolitan St. R. Co., 32 Misc. Rep. 262; Dolliver v. American-Swan Boat Co., id. 264). The statute by giving the attorney a lien does not make him the principal. The client still remains in control of his cause of action, with the same right to settle which clients always had (Fenwick v. Mitchell, 34 Misc. Rep. 617; Fischer-Hansen v. Brooklyn Heights R. R. Co. 173 N. Y. 492; Morehouse v. Brooklyn Heights R. R. Co. 43 Misc. Rep. 414). A collusive settlement, made to defraud an attorney, will be set aside in favor of the attorney, where that is necessary to enable him to foreclose his lien; an honest settlement will not be interfered with. There is no claim that the settlement here was collusive against the attorney. It was honest, and must therefore stand. The attorney's lien is therefore only for $50.

But this motion cannot prevail, for the reason that the plaintiff is solvent and able to pay his attorney. A party

Digitized by Google

to an action is only secondarily liable to the attorney of the adverse party for the amount of his lien, viz., he is only liable when such adverse party is insolvent and unable to pay his attorney.

Motion denied.

THE CITY OF NEW YORK, Plaintiff, v. JAMES A. CODY et al., Defendants.

(Supreme Court, Kings Special Term for Trials, July, 1904.)

Interpleader — Laches.

Where judgment creditors of contractors with the city of New York — holding moneys earned of it by them — recover judgment in actions, brought against the city and certain assignees of the fund to set aside an assignment of it made by the contractors and have the fund applied on the creditors' debts, and have not made a party defendant to their actions one whom they knew had an assignment of the fund prior to the assignment they sought to set aside, they cannot defeat a subsequent action of interpleader, brought by the city, declining to pay, against all the claimants to be permitted to pay the money into court and have the claimants litigate the matter among themselves, upon the ground that the city was guilty of *laches* in not pleading in their actions the claim of the prior assignee.

SUIT of interpleader against various persons claiming money which the plaintiff owes to the defendants Cody Brothers for work done for it by them under a contract. The plaintiff prays relief that it be allowed to pay the money into court, and that the defendants be left to interplead among themselves for the same.

Edward H. Wilson for plaintiff.

Joseph Fitch and Henry H. Sawyer for defendants.

GAYNOR, J.: The essential facts are these: The plaintiff owed the defendants Cody Brothers $9,962.53. They

Digitized by Google

assigned the debt to George Fruh, and he assigned it to the defendant Cahen. They afterwards also assigned it to Teresa Cody, and she assigned it to the defendant Elizabeth Cody.

After notice of these assignments had been filed with the comptroller of the plaintiff, the defendants Fleer and others, as judgment creditors of Cody Brothers, brought suits against them and this plaintiff (the City of New York) and the said Teresa and Elizabeth Cody to set aside the said assignment to the said Teresa Cody, and to reach the fund and have it applied on their judgments; and they prevailed in their suits.

Instead of paying over the money under the said judgments, the city now brings this interpleader suit, making the said Cahen a defendant, as she claims the fund under the said prior assignment to Fruh. Cahen was not a defendant in the said judgment creditor suits, nor did the city in its answer therein set up her claim. It answered by a general denial only.

As the said judgment creditors knew of the assignment under which Cahen claimed the fund (they produced it and put it in evidence on the trial of their suits), but nevertheless omitted to make Cahen a defendant, their claim now that the city should be defeated here for laches in not pleading the claim of Cahen in the said suits is untenable. They were in no way misled by the city, and hence there is no foundation for their claim of laches against the city. The neglect of Cahen not being a party was primarily theirs. If the city alone had knowledge of the Cahen claim, or if it was under a duty to cause it to be litigated in the said suits, and the plaintiffs therein were unable to cause it to be so litigated, the case here would be different (Baker v. Brown, 64 Hun, 627).

Judgment for the plaintiff without costs.

Digitized by Google

JOHN HARTMANN, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Special Term for Trials, July, 1904.)

Cause of action—When entire, can be the subject of one action only—Brooklyn—Power to reduce a salary in the department of city works.

Where a clerk in the department of city works of the city of Brooklyn, entitled before consolidation in 1898 to a salary of $1,500 payable monthly, after being retained in office in 1898 but in that year reduced to $1,200, subsequently removed and reinstated, assigns his salary for the seventeen months he was out to his counsel and at the rate of $100 per month, the latter's recovery of the city on that basis bars the clerk from further recovering of the city $25 per month from the time his salary was reduced in 1898 and this because the debt is entire.

Although the charter of the city of New York gives the deputy and not the commissioner of the said department power to reduce a salary, a reduction is valid where the commissioner directs it and the deputy actually makes it.

ACTION to recover arrears of salary.

R. Percy Chittenden for plaintiff.

Edward H. Wilson for defendant.

GAYNOR, J.: The plaintiff was a clerk in the department of city works of the city of Brooklyn at $1,500 a year, payable in equal monthly sums. Having been transferred to the new city of New York on January 1st, 1898, the commissioner of water supply of the city sent a communication to the deputy commissioner of water supply for the borough of Brooklyn on February 7th, 1898, to reduce the plaintiff's salary to $1,200, beginning with January, and the deputy did so. The plaintiff was paid $100 a month, until he was removed at the end of December, 1898. He was reinstated by a writ of mandamus on June 5th, 1900. At that time he assigned his salary for the interval of seventeen months that he was out to his counsel, the written assignment expressing it to be at $100 a month. The said

Digitized by Google

counsel brought an action therefor against the city and recovered $1,700 for the said interval of seventeen months.

This action is to recover $25 a month from the beginning of 1898.

In the first place, the recovery by the said assignee is a bar to a further recovery for the period covered by the assignment, and also for the preceding period. If the city was liable for a salary of $1,500 a year, it is liable for a balance of $25 a month for the year 1898, and for $125 a month for the said interval when the plaintiff was out unlawfully, making in all $2,425. This was an entire debt, constituting one indivisible cause of action. It could not be split up, and the recovery in one action thereon is a bar to another (Bendernagle v. Cocks, 19 Wend. 207; Reformed Church v. Brown, 54 Barb. 191; Secor v. Sturgis, 16 N. Y. 558; Baird v. United States, 96 U. S. 430).

In the next place, I think that the reduction was by the deputy commissioner. The commissioner did not have the power to reduce the salary; the power was with the deputy commissioner (City Charter, § 1897); but although the commissioner directed the deputy commissioner to make the reduction, the act of reduction was in fact and in law that of the latter, and therefore valid. He could have refused, but did not do so (Havron case, 85 App. Div. 110).

Judgment for the defendant.

BRUNO HAACK, Plaintiff, *v.* THE BROOKLYN LABOR LYCEUM ASSOCIATION, Defendant.

(Supreme Court, Kings Trial Term, July, 1904.)

Negligence — Measure of care due a bare licensee.

A boy, who, while picking some tickets from the ruins of a building destroyed by fire, is hurt by the fall of a wall left standing there, is at best a bare licensee to whom the owner of the building owes no duty beyond that of doing him no affirmative wrong or injury.

MOTION on the minutes to set aside a verdict for the plaintiff.

Digitized by Google

James C. Cropsey, for plaintiff.

Senftner & Senftner for defendant.

GAYNOR, J.: The buildings on the defendant's property were destroyed by fire. The plaintiff and some other boys came upon the premises and were picking up some sort of tickets out of the ruins when one of the walls left standing by the fire fell and hurt the plaintiff. I do not see how there is any liability in the defendant. The plaintiff was a bare licensee, at best, and the defendant was under no relation or obligation to him whatever, beyond what we are all under not to do any affirmative wrong or injury to one another. This is a principle too well known among us to call for any citation of authority, unless for the sake of pedantry.

It is claimed, however, that the defendant maintained a liquor saloon in the rear of the premises, that it was open to public use, that there was an alley or route to it across the premises from a gateway, and that the plaintiff was in this route when hurt. But as he was not going to the saloon I do not see how this helps his case. The defendant in that case was still under no relation or obligation to him other than that already stated (Pollock on Torts, 6th ed. p. 505; Converse v. Walker, 30 Hun, 596). This case has been tried before and up on appeal (93 App. Div. 491), but the facts are now fuller.

I submitted the case to the jury on the single question whether such a saloon was there and open, in which case the public were invited by the defendant to come through thereto. If that theory of law helps the plaintiff's case, it is clear to me that the verdict is against the weight of evidence. The evidence that a saloon was open was very loose, whereas there was positive and precise evidence that the saloon building and the bar-room and bar were destroyed by the fire, and not rebuilt and reopened until some time after the accident to the plaintiff.

The motion is granted.

Digitized by Google

THE SCHENECTADY RAILWAY CO., Plaintiff, *v.* J. ALEXANDER LYON, CHARLES L. WHITMYRE, GILBERT DE GRAFF, JONES M. JACKSON, Impleaded with GRACE HAWLEY and MARY J. SWARTFIGUER, and Others, Defendants.

(Supreme Court, Montgomery Special Term, July, 1904.)

Condemnation Law — When a proceeding thereunder becomes a distinct proceeding as to each owner, justifying a separate judgment as to each and to each successful owner costs as a matter of right.

Where a railway company seeks to condemn, in a proceeding taken under the Condemnation Law, real property held in severalty by the defendants, and some of them default in the proceeding, some appear and consent to condemnation, others appear and object to the jurisdiction and still others answer under Code Civ. Pro., § 3365, but not by the same attorneys, the proceeding constitutes, in effect, as many distinct proceedings as there are owners of distinct parcels and this justifies a separate judgment as to each and entitles each successful owner to costs as a matter of right.

PROCEEDINGS brought under the Condemnation Law, to acquire certain parcels of real estate owned by the defendants in severalty. The property is in no way devoted to public uses, and the rights and interests of the respective owners are not in any way held in common. Some of the defendants made default; others appeared and consented that judgment for condemnation be taken; others appeared and objected to the jurisdiction of the court; and others made answer as provided by section 3365 of the Code of Civil Procedure. All of the answering defendants did not appear by the same attorney, but the moving parties now before the court, although answering separately, except Grace Hawley and Mary J. Swartfiguer, who answered jointly, were represented by the same attorney. The issues formed by the pleadings were brought to trial before the court, pursuant to section 3367 of the Code of Civil Procedure, and the decision of the court, in writing, was made and filed under which judgment was entered in favor of the plaintiff against some of the defendants; and the petition dismissed as against others with costs, pursuant to section 3369 of the

Digitized by Google

Code of Civil Procedure. The moving defendants each taxed a separate bill of costs. Upon retaxation, the clerk disallowed the same on the ground that only one bill of costs should have been allowed to them jointly. The defendants Lyon, Whitmyre, Jackson and De Graff each move separately, and the defendants Hawley and Swartfigure move jointly, to have such retaxation set aside, and the clerk directed to tax costs to each of them answering separately.

Louis M. King, for motions.

James A. Van Voast, opposed.

SPENCER, J. It is a familiar rule in actions in this court that, where several defendants appear and answer by the same attorney, and judgment is rendered in their favor, but one bill of costs is allowed. This goes upon the presumption that the claim or claims made by the plaintiff have application to all the defendants, and that the latter have a joint interest in defeating the same. But where it is made to appear that such is not the case, and that the defenses of the several defendants were not substantially the same, and that each of such defenses required a separate answer and different proof, it is the rule to allow separate bills of costs to each of such defendants.

The plaintiff here does not seek relief against the defendants jointly, but seeks a separate condemnation against each defendant severally, and under the provisions of the Code of Civil Procedure (§ 447), regulating actions in this court, would not be permitted to join them as defendants. The defenses of the several defendants are as separate and distinct as are the demands for relief asked against them, and one defendant could not answer in behalf of another.

It is only by virtue of the provisions of the Code of Civil Procedure, relating to condemnation (§§ 3357–3384), that a party seeking to acquire lands for public purposes may join parties whose interests are separate and diverse; and while the same may, for some purposes, be regarded as a single proceeding, it constitutes in effect as many separate and distinct proceedings as there are owners to separate and distinct parcels.

Digitized by Google

I have been referred to the case of Prospect Park & Coney Island R. R. Co., 67 N. Y. 371, as decisive of the question under consideration, but that case was not decided under the provisions of the Code of Civil Procedure, which now obtain, and the question here involved does not seem to have received the particular attention of the court, and I cannot regard it as controlling.

Neither was this question discussed in the case of City of Syracuse v. Benedict, 86 Hun, 343; 67 N. Y. St. Repr. 614, but from the manner in which section 3372 of the Code of Civil Procedure is there cited, it gives the impression that if the defendants in that case had not been copartners, having a joint interest, separate bills of cost would have been allowed to each. That costs should be allowed to a successful defendant can be no longer questioned since the decision of the case of Matter of Brooklyn Union El. R. R. Co., 176 N. Y. 213.

I am also of the opinion that a fair construction of the provisions of the Code of Civil Procedure in relation to defendants in condemnatory proceedings carries the implication that a separate judgment may be had against or in behalf of each defendant, as the court upon the trial may deem necessary or proper, and that the controversy between the plaintiff and the owner of each parcel sought to be taken is regarded as a separate and distinct issue. The case at bar is a fair illustration of the necessity and reasonableness of this rule, as judgment was taken by the plaintiff against some of the defendants by default, against others upon the overruling of their objections to the jurisdiction of the court, against others upon a trial of the merits, and dismissed as to others upon a similar trial. The issues between the plaintiff and the respective defendants were different and proof in support of one could not be regarded as proof in support of any other.

The further claim is made by the defendants that the judgment dismissed the petition as to the respective defendants with costs, and that, under such direction, the clerk had no authority to tax costs in behalf of each defendant; and the plaintiff in support of its contention cites Matter

Digitized by Google

of New York, West Shore & B. R. Co., 28 Hun, 505; Fischer v. Langbein, 31 Hun, 272. But these were decisions made construing orders of appellate courts, and where the granting or withholding of costs was within the power of the court making the order.

In the case at bar, the trial court had no discretion as to granting or withholding costs, and the absence or presence of any direction in the decision of the court in respect to costs is ineffectual to deprive the parties of their rights. The decision, however, follows the language of section 3369 of the Code of Civil Procedure, which provides as follows: "Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk, at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial." The court, by its decision, could not and did not control the question of costs, for the right to costs is regulated by the statute and must be determined thereby upon a taxation by the clerk.

On the hearing of these motions, the moving parties read affidavits in support of their contention, and the plaintiff also read opposing affidavits. This was done without objection by the plaintiff, who, after the motions had been submitted to the court, filed a supplemental brief, wherein it contends that the use of such affidavits was improper, and cites the case of Lyman v. Young Men's Cosmopolitan Club, 38 App. Div. 220. This case is an authority for the position now taken by the plaintiff, but both parties having used these affidavits upon the hearing without objection, I am of the opinion that the right to object to their use has been waived.

It follows that the motions by the respective defendants must be granted with costs, and an order entered setting aside the retaxation by the clerk and directing him to retax costs to each of the moving defendants who have separately answered.

Ordered accordingly.

Digitized by Google

PETER A. BAIRD, as Committee of the Person and Property of JACOB HOUCK, an Incompetent Person, Plaintiff, *v.* JOHN VAN VECHTEN, Defendant.

(Supreme Court, Montgomery Special Term, July, 1904.)

Writ of assistance — Discretionary — Not issued to perform something the judgment did not require to be done.

An interlocutory judgment, recovered in an equitable action brought by the committee of an incompetent person to set aside as fraudulent a conveyance of a farm made by the incompetent person to the defendant, merely setting the conveyance aside and requiring the defendant to account before a referee for his use of the farm and expenses incurred, does not authorize issue of the discretionary writ of assistance to remove from the farm the occupant, he claiming possession under an agreement with the defendant to work the farm on shares, where he had, before a *lis pendens* was filed in the action, received the key of the dwelling house on the farm, removed chattels to the dwelling house, performed considerable work preparatory to the next season's crop, and on the day the *lis pendens* was filed had moved into the dwelling house.

APPLICATION by Henry A. Houghton for an order modifying an order granting a writ of assistance directed to the sheriff to remove the defendant, and all parties claiming under him, from a farm located in Montgomery county. The applicant asks to have the order modified so as to exclude him from the operation thereof.

Houghton is in possession under an agreement with the defendant by which he was to have possession of the farm and work it on shares. Subsequent to the making of this agreement, the defendant's grantor, Houck, was adjudged incompetent and the plaintiff appointed committee of his person and property. The plaintiff thereupon brought this action to set aside the conveyance from his ward to the defendant. Notice of *lis pendens* was filed December 21, 1903. Prior to that time Houghton had received delivery of the keys of the premises and had removed certain of his chattels thereto and had performed considerable work

Digitized by Google

thereon preparatory to the next season's crop; and on the day upon which notice of *lis pendens* was filed, moved into the dwelling-house located upon the premises. In April following, an interlocutory judgment was entered in the action setting aside the conveyance from the plaintiff's ward to the defendant and requiring the defendant to account to a referee for his use of the premises and property and for the expenditures made by him in respect thereto. A copy of such interlocutory judgment was served upon Houghton and a demand made for the delivery of possession, which was refused, and thereupon the order directing the writ of assistance to issue was granted. The sheriff being about to remove Houghton from the premises, the latter obtained a stay of proceedings and made this application to modify the order so as to exempt him from its provisions. He was not made a party to the action.

Christopher J. Heffernan, for Henry A. Houghton, for motion.

Nisbet & Hanson, for Peter V. Baird, opposed.

SPENCER, J. A writ of assistance is the process by which the court puts a party into possession of specific property, the possession of which has been awarded to him by the judgment. The judgment is the sole justification for the writ. A writ of assistance should not run to accomplish something which a judgment has not required to be done.

The judgment here does not award to the plaintiff possession of the premises sought to be acquired by the writ of assistance. The action was not brought to recover possession of any specific, real or personal property, but was in equity to obtain an adjudication setting aside a certain conveyance of real and personal property executed by the plaintiff's ward to the defendant. After trial interlocutory judgment was entered setting aside the conveyance as fraudulent and directing the defendant to account before a referee for his use and occupation of the premises and property and the expenses incurred by him in relation thereto. Immediately

Digitized by Google

upon the entry of such interlocutory judgment, application for the writ of assistance to put the plaintiff in possession of the premises was made and granted. I am of the opinion that the judgment does not justify the writ. There is no adjudication by the court that the plaintiff shall be put into possession. The plaintiff invokes the rule of *lis pendens,* and, if it clearly appeared that notice of the pendency of the action was filed prior to the taking of possession by the applicant, the rule invoked should be enforced without regard to any questions of conscience or equity, because the maintenance of the rule is necessary for the self-preservation of the courts, and any laxity in its enforcement would lead to public mischiefs far greater than could result from any harshness in its application in any particular instance. It is only by the strict enforcement of this rule that courts are able to enforce their judgments and prevent their being made abortive by subsequent alienations.

But the commencement of the *lis pendens* is the point of time at which the court acquires jurisdiction of the *res,* and the determination of that point of time in respect to strangers, persons not parties to the action, sometimes becomes a difficult and complicated question of fact. Without deciding the interesting question discussed by counsel upon the argument and in their briefs as to whether the applicant Houghton is in occupation of the premises as lessee of the defendant or as a cropper under a contract for service, actual possession of the premises by him at the time of the commencement of the action was notice to the plaintiff of any equitable or legal right which he might have by virtue of either relation. The question whether he was or was not in possession at the time is also in dispute and involved in some doubt. All the questions of fact from which to determine whether he should be regarded as an *ante litem* claimant or a *pendente lite* claimant should be left to be determined by the plaintiff in an action where the question of the possession of the property is involved and where the rights of each may be safeguarded.

Furthermore, the issuance of a writ of assistance is not a strict matter of right, but rests in the sound discretion

Digitized by Google

of the court. The enforcement of this writ at this season of the year would result in great injustice and hardship to the applicant who, without notice of the incompetency of plaintiff's ward or of the defendant's fraud, has gone into occupation and cultivated the crops nigh to harvesting, and to dispossess now would occasion an injury for which there would be no adequate remedy. The plaintiff is, no doubt, subrogated to the rights of the defendant under the contract with Houghton, and may claim the fruits of the farm in accordance therewith, and if Houghton's husbandry be not satisfactory, he may revoke the agreement at the expiration of the year as by the agreement provided. In this way justice may be accomplished for each party and the rights of none endangered.

Let an order be entered modifying the order as to the applicant Houghton and exempting him from its operations, with costs.

Ordered accordingly.

THE SCHENECTADY RAILWAY CO., Plaintiff, *v.* THE UNITED TRACTION CO., Defendant.

(Supreme Court, Montgomery Special Term, July, 1904.)

Contract between street surface railroads — When a lessor corporation cannot, in view of the rights of the public to travel, arbitrarily decide, and use physical force and obstructions upon its tracks to enforce its decision, that cars run over its tracks by a lessee corporation are somewhat longer and heavier than the agreed length and weight.

A contract made between street surface railroads, having special reference to their duties to the public and in the use of public franchises, must not be construed so as to defeat the purpose for which it was intended but so as to accomplish the public purpose it was designed to subserve.

Where a controversy arises between a surface railroad company operating in Albany and a similar railroad company operating between Schenectady and that city under a written agreement made

Digitized by Google

between them securing, for value, to the latter road the right to run its cars over the tracks of the former in Albany and providing that the latter should not operate cars of such excessive size or run them at such excessive speed as to endanger the property of the former and that until the parties agree upon another type of car the latter may operate cars forty-eight feet over all and not exceeding in weight twenty-five tons when loaded, as to whether certain cars run over the Albany tracks by the latter are to any extent a violation of the above covenant and limitation, and it appears that the cars presently objected to by the Albany railroad have run for some time without resultant accident or injury, the Albany railroad cannot, in view of the right of the public to travel over the Schenectady railroad and over the tracks of the Albany railroad and of the relative insignificance of the matters in dispute, be permitted arbitrarily to decide the question and to that end obstruct its own tracks and use physical force to prevent the Schenectady railroad from running those cars over them, and the Albany railroad will be restrained from further interference of such character, and if entitled to relief should seek it in the courts.

MOTION by plaintiff to continue an injunction *pendente lite.*

James O. Carr (Lewis E. Carr, of counsel), for motion.

Patrick C. Dugan (Edgar L. Fursman, of counsel), opposed.

SPENCER, J. The parties to this action are street surface railroad corporations engaged in transporting persons and merchandise over and along public thoroughfares by virtue of exclusive franchises granted to them by municipalities. As common carriers, their duty is to transport over their roads all persons and merchandise that may demand transportation, and to use reasonable diligence in furnishing adequate means and facilities for that purpose. The time was when any neglect to perform these duties, or any interference by others therewith, was of small importance; but under the present conditions of life, their prompt and efficient performance has become a public necessity, and any interference therewith, even for an hour, is the occasion of loss and discomfort to multitudes of people. In such instances where the per-

Digitized by Google

formance of these duties may intrench upon private rights, the latter must wait upon public necessity and seek protection by means which will not create greater mischiefs than those sought to be cured.

The present contention of these parties grows out of an agreement entered into between them on the 26th day of June, 1901, whereby, among other things, the plaintiff, for a valuable consideration, acquired from the defendant the right to run its cars over certain tracks of the defendant in the city of Albany. The operation of said cars by the plaintiff is, under the contract, subject to certain terms and conditions among which are the following: "The Railway Company (plaintiff) shall not use or operate any car or cars of such excessive weight either with or without loads, or at such unusual or excessive rates of speed, or in any other improper manner, so as to unnecessarily destroy or impair, or unreasonably wear the tracks, curves, turnouts, switches, bridges, track structures or other property of said party of the first part (defendant), or so as to make the maintenance of the track of the United Company (defendant) unusually difficult or expensive. Until another type of car may be agreed upon between the parties hereto, the Railway Company (plaintiff) may operate cars forty-eight feet over all, with four motor equipments, air brake and track brake equipments, etc., said cars to weigh not to exceed twenty-five tons when loaded."

In pursuance of this agreement, the plaintiff, in September, 1901, commenced the operation of its cars upon the defendant's tracks and continued the same, from day to day, until sometime in May, 1904, when the defendant gave notice to the plaintiff that it was operating certain cars which did not comply with the provisions of the contract and forbade any further operation of such cars. The plaintiff claimed that all the cars then being operated by it were reasonably within the terms and conditions of the contract, and had been accepted and approved by the defendant and operated with its knowledge and consent, and claimed the right to so operate them under the provisions of the contract. Thereupon the defendant placed obstructions upon its tracks and by physical means prevented the plaintiff from operating certain of its

Digitized by Google

cars thereon, and threatened to continue such obstructions and interferences. The plaintiff now brings this action praying for an injunction restraining the defendant from further interfering in the manner aforesaid with the operation of its cars upon the defendant's tracks. A preliminary injunction having been granted, the present motion is to continue such injunction pending the action.

The defendant denies the right of the plaintiff to maintain the action on the ground that the allegations of the complaint do not constitute a cause of action. I think, however, that the principle invoked by the plaintiff has been too often employed to sustain actions for injunctions to be any longer open to question.

Both parties, being corporations of a *quasi*-public character, engaged in a business in which the public have an interest, and in which they necessarily employ public franchises, are prohibited from making contracts which are inconsistent with the purposes for which they were organized and in contravention of their duties. Therefore, the contract in question, having especial reference to their duties to the public and in the use of public franchises, must not be construed so as to defeat the purpose for which it was intended, but so as to accomplish the public service which it was intended to subserve.

The defendant, being in the enjoyment of and charged with the execution of a public franchise in running public conveyances upon the streets of the city of Albany, may be held responsible for a reasonable and proper use thereof by itself and others under contract with it; and the terms and conditions whereby it has sought to reserve to itself such control are clearly within its rights and duties in that regard.

But the defendant having granted to the plaintiff the right to operate cars over its tracks, the prompt, regular and efficient operation thereof becomes as much a matter of public concern as the similar operation of the defendant's cars; and any stipulation between the parties that provides for or results in a prevention thereof will be disregarded as inconsistent with the performance of their public duties and against public policy. In this regard they have not the large liberty which

Digitized by Google

private individuals possess in regard to their personal concerns and property; but as *quasi*-public corporations are held strictly to the performance of their public duties irrespective of their mutual covenants with one another.

It is clear from the contract that the control which the defendant retained in respect to the character and operation of the plaintiff's cars was that the plaintiff should not operate cars of such excessive weight and size, or propel them at such excessive rates of speed, as would endanger the defendant's property and subject it to unusual difficulty or expense. The changing conditions in the methods of transporting passengers and merchandise were clearly in the minds of the parties, and, while the defendant may in the first instance have the right to insist that the plaintiff shall not operate cars exceeding the length and weight specifically mentioned in the contract, it, nevertheless, having covenanted to agree to the use of cars of other lengths and weights, may not arbitrarily or unreasonably refuse its consent to the operation of such other cars. It must exercise its rights within reason as indicated by the circumstances and the necessities of the situation and so as not to endanger the public service.

Upon the argument, the defendant contended that some of the cars operated by the plaintiff were of such width as to interfere with the passage of cars upon adjoining tracks and of such weight as to cause damage to the contents of houses situated along the streets. I have searched in vain to find anything in the papers submitted that in any way justifies these claims. It appears that the cars referred to have been in operation for a considerable period, and not a single instance of accident or injury resulting from their use has been brought to the attention of the court. Had such an incident happened, the defendant would no doubt have made the same known, and not depended, as it has, upon general and indefinite allegations in that regard. Furthermore, the cars being in daily use by the public, the court may, I think, take judicial notice that their use is not accompanied by such hazards as the defendant contends.

The right of the plaintiff to operate cars over the defendant's tracks is conceded by the defendant, but it claims the

Digitized by Google

right to decide as to those which plaintiff may run and those which it may not, and as to the latter, it claims the right to employ force to prevent their operation. It is difficult, however, to conceive how the operation of one type of car may be legal while the operation of a slightly different type by the same party is illegal.

I am of the opinion that the defendant has no right to prevent by physical force the operation of plaintiff's cars over its tracks. Defendant's occupation of the streets of Albany is not the same as that of the owner of private property. It may no doubt, in some instances, employ force to resist or prevent trespasses or other illegal interferences with its cars; but it has no such possession or control over the streets of the city or its tracks laid therein that it may employ physical force to prevent others from passing over the same or to forcibly remove them therefrom. It has neither duty nor right in that regard. It may not treat such persons as trespassers upon its property and employ physical force in the enforcement of its rights.

In this connection it will not be out of place to say that it is a matter of current history that public corporations in the employment of public franchises have recently been subjected to great loss and the public to irreparable injury from acts of violence done by ignorant and misguided men under the pretext that such corporations were in some way violating their duties or committing breaches of contracts or other obligations. In such instances, the courts have not been slow, or the executive of the State backward, in condemning and punishing the perpetrators of such acts of violence. The defendant is among the last that should invoke the methods of the mob in attempting the enforcement of its rights.

I do not deem it necessary on this motion to decide whether certain cars operated by the plaintiff and objected to by the defendant are or are not strictly within the terms of the agreement, or whether the use and service thereof has been consented to by the defendant. The motion to continue the injunction is granted upon the view that the defendant has not the right to decide for itself the questions involved in this controversy, and to enforce compliance therewith by

Digitized by Google

physical force; that it should have resorted to the courts for the protection of its rights and the justification of its claims.

I have not been referred to any authority that is directly in point and clearly supporting the positions here taken, and I have, therefore, made the decision to rest upon general principles which I believe to be matters of common acceptance among law-abiding persons. The following, however, are a few of the authorities that have led me to the conclusions to which I have arrived. Atlantic & Pacific Telegraph Co. v. Baltimore & Ohio R. R. Co., 14 J. & S. 377; Sickles v. Manhattan Gas-Light Co., 64 How. Pr. 33; Electric Construction Co. v. Heffernan, 34 N. Y. St. Repr. 436; McEntee v. Kingston Water Co., 165 N. Y. 27; Davis Mach. Co. v. Robinson, 41 Misc. Rep. 329.

Let an order be entered continuing the injunction during the action, with costs to abide the event.

Ordered accordingly.

TERENCE A. SMITH, Plaintiff, *v.* BARTHOLOMEW DUNN, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Action for a dissolution of a partnership, etc.— Complaint — When the plaintiff must prove affirmatively that the parties intended to and did form a partnership — A complaint under which proof of a joint adventure would be insufficient — When participation in firm profits does not make one a partner.

Under a complaint, in an action brought for the dissolution of a partnership and for the appointment of a receiver of its property and for an accounting, alleging that on a certain date the plaintiff and the defendant entered into a partnership to carry on certain city contracts the defendant had secured, that since that date they as partners had undertaken and agreed to perform some of the contracts, had completed some and partially completed others and earned profits, and that the defendant withholds the plaintiff's agreed share of one-half of the net profits besides denying him access to the firm books as well as an account of its business, the

Digitized by Google

plaintiff must fail unless he proves affirmatively that the parties intended and agreed to enter into a partnership *inter sese*.

Under such pleadings the establishment of a joint adventure would be insufficient.

Mere participation in firm profits as a means of compensation, without liability for firm losses, does not make a partner in the firm one receiving such compensation, and if entitled thereto as employee he cannot obtain it in such an action as the above.

ACTION for the dissolution of a partnership, the appointment of a receiver and for an accounting.

Isaac and Jacob Fromme, for plaintiff.

Jacob Marks, for defendant.

CLARKE, J. Action for the dissolution of a partnership, the appointment of a receiver of the partnership property and for an accounting. The complaint alleges "that on or about the 31st day of March, 1897, the plaintiff and defendant formed a partnership for the purpose of carrying on certain contracts entered into by said defendant with the city of New York for the construction of certain public works in the said city of New York, under an agreement that the plaintiff and defendant should co-operate in the carrying on and management of said business and should divide between them in equal shares or proportions the net profits of such business. * * * Since the said 31st day of March, 1897, the plaintiff and defendant as such partners have undertaken and agreed to perform a large number of contracts for said city of New York and have completed a number of said contracts and earned profits thereon to a large amount, and have other of said contracts now in a state of partial performance, and although said partnership has never been dissolved, the said defendant has taken exclusive possession of the partnership books and stock and has refused and still refuses to allow the plaintiff to have access thereto, and said defendant has collected and received, and now has in his possession large

Digitized by Google

sums of money of said partnership, and has refused and still refuses to render any account thereof to the plaintiff or to pay to the plaintiff his share of the profits of said partnership." The action was commenced in June, 1903, upward of six years after the formation of the alleged partnership. The alleged agreement was oral. The defendant absolutely denies it. Though many of the contracts with the city have long been completed, no account has ever been rendered to the defendant nor has he been paid any of the "net profits." It was in evidence that prior to this alleged agreement of March, 1897, and about a year before January 28, 1897, the plaintiff and defendant were interested in certain other contracts with one Bernard Mahon and Thomas J. Dunn. Their mutual relations at first were established by a verbal contract, which was afterward reduced to writing and was introduced in evidence by the defendant. Under that verbal agreement contracts were to be obtained from the city for public works. Messrs. Mahon and Thomas J. Dunn were to put in the capital and plaintiff and defendant to superintend the work and look after it and the profits were to be divided equally. When the agreement was reduced to writing all the contracts had been obtained from the city and most of them had been completed. This contract describes each one of the city contracts and in whose name taken. It was a partnership agreement without doubt. It described certain contracts obtained by Dunn in his name and certain contracts obtained by Smith in his name. It provides: "Whereas Thomas J. Dunn and Bernard Mahon are to furnish the capital required by said Bartholomew Dunn and Terence A. Smith to perform the work required by said contracts," it was agreed between all four that T. J. Dunn and Mahon should each receive one-quarter of the profits on the respective contracts for which they shall have provided one-half the capital and Bartholomew Dunn and Smith should each receive one-quarter of the profits "and are to attend to the carrying out of the same." All losses were to be borne equally by all the parties. The contract in the case at bar is claimed to be similar in character, with the elimination of Mahon and T. J. Dunn. There is nothing inherently

Digitized by Google

improbable in the claim, because this previous contract shows that the parties were accustomed to associate in this kind of business and to divide profits, and that Smith, by reason of his experience as a contractor and familiarity with figuring on proposals and estimates, was a valuable man in such an enterprise. In concerns contemplating the business of acquiring and performing city contracts the getting of the contract is of the utmost importance. As these contracts are let at public competition to the lowest bidder the ability to figure closely is of as much importance as the ability to provide the money necessary to start the work. So that a partnership in which one party was to furnish the working capital and the other do the estimating to obtain the contract and superintend the work would neither be unlikely nor unusual. The question is, has the plaintiff sustained the burden of proof of establishing that such a contract of partnership was, as matter of fact, entered into? After plaintiff had closed his case, having given in great detail evidence of conversations as to each particular contract in regard to which he claimed his interest extended, and after a motion to dismiss had been argued at length upon the point that no evidence had been tendered which supported the allegation of the complaint "that on or about the 31st day of March, 1897, the plaintiff and defendant formed a partnership," etc., the plaintiff was recalled and testified that along in the first of March, 1897, before any of the conversations to which he had testified in regard to specific city contracts, he met Mr. Dunn on Riverside drive and had a conversation. That he said to Mr. Dunn: "Now Mr. Mahon is interested in the Canadian railroad business, he is not going to take an active part any more in the city contracts. You and I will take the contracts that come out hereafter jointly. You furnish the bonds and the money that is required and I will make the estimates and get the work. Mr. Dunn said: 'All right,' and I said: 'There is to be no others interested but you and I?' He said: 'All right, we might as well do this ourselves as have three or four into it.' And I was to go ahead and do the work, as he was not familiar with contracting at the time. The character of the work I intended to carry on was sewer

Digitized by Google

business. We would divide the profits on any work that we got and he would furnish bonds and the capital that was required to carry on that work and I would look after it." That was all said prior to the Pool contract, which was the first contract on the 23d of March, 1897. I do not credit this story for the following reasons: *First,* it was evidently born of the necessities of the case, after the plaintiff had rested and after a long argument in plaintiff's presence had pointed out the defects in his case which this testimony was produced to remedy. *Second,* in each specific instance of a contract he had testified to a detailed conversation as to the obtaining of the contract, as to the respective functions and duties of the parties and the equal division of the profits. If this general agreement had, as matter of fact, theretofore been made, these subsequent agreements were supererogatory. What reason could there have been for going over again in each instance the terms of a partnership which already existed? *Third,* the precise conversation which plaintiff details as having taken place about the first of March, 1897, in regard to Mr. Mahon having become interested in the Canadian railroad business, and, therefore, not going to take an active part any more in city contracts, and the proposal for Smith and Dunn to take them and divide the profits, etc., the plaintiff had given earlier in the case in regard to the Academy street sewer. This contract was dated January 19, 1898, eleven months after the alleged agreement of partnership of March, 1897, and after three of the other contracts which are the subject of this suit had been obtained from the city. His testimony was: "I talked with Mr. Dunn about the Academy street sewer. I said now we will go into this work leaving Barney Mahon and Mr. Thomas Dunn out. As Mr. Mahon is interested in the Canadian railroad he don't seem to feel disposed to take very much interest in it. You and I can hold onto this; you furnish the bonds and I will prepare the estimates, and whatever money is required you will furnish and we will divide the profits equally. He said all right." I cannot believe that this conversation took place in regard to the Academy street sewer if it had already occurred eleven months before in regard to the gen-

Digitized by Google

eral scheme. If plaintiff told the truth about the March agreement Mahon and Thomas J. Dunn had been out of the arrangement for eleven months. It is asking too much of the court to rearrange this testimony and antedate it eleven months to suit the exigency of the developed case. The defendant's version of the relations of the parties is as follows: That shortly after the agreement of January 28, 1897, was signed he and Smith had a talk in which Smith said: "Now, if you are going to estimate on any other city contracts, if I can be of any help to you I will help you in figuring on other work. I said, 'All right, Mr. Smith, I will make it all right with you.'" Defendant also testified that he said to plaintiff, "if he would go on the work, look after the work and see that the men were doing a fair day's work and report to me and do anything that I would ask him to do, I would pay him for it. Nothing was said as to how much I would pay him for his services and the subject of what I would pay him was not referred to after that." Defendant further testified that thereafter he requested plaintiff to figure on the estimates upon the contracts which are embraced in this suit and that he did afterward tell him to go on the work of these contracts and see if the men were doing what was right, and in any way he could assist in carrying on the work. So both parties agree that Smith figured on the estimates, and to some considerable extent superintended the work, and this for a number of years. Defendant claims to have paid Smith a "couple of thousand dollars." But it was testified that this amount was all paid by checks, and it is conclusively shown that in an action on an accounting growing out of the written contract of January 28, 1897, defendant has charged all of these checks and their amounts against Smith, so that it appears that Smith has not been paid anything for very considerable and — so far as the estimating which obtained these contracts is concerned — valuable work. But, conceding all that, is the plaintiff entitled in this action in equity for the dissolution of a partnership, the appointment of a receiver and for an accounting to the relief demanded in the complaint, it being recalled that the complaint, as the foundation of the action alleges, "that on or about the 31st day of

Digitized by Google

March, 1897, the plaintiff and defendant formed a partnership for the purpose of carrying on certain contracts entered into by said defendant with the city of New York" and "since the said 31st day of March, 1897, the plaintiff and defendant, as such partners, have undertaken and agreed to perform a large number of contracts," etc. The very gist of this action is the partnership. The plaintiff has the burden of establishing this. If his proof falls short of this the complaint must be dismissed. Heye v. Tilford, 2 App. Div. 346. If he establish a joint adventure that is not enough under these pleadings. It should be borne in mind that the joint enterprise, if such there be, has not been concluded. There is a sewer contract with the city aggregating over $850,000 still in process of completion. As pointed out in Heye v. Tilford, 2 App. Div. 346; affd., 154 N. Y. 757; Marston v. Gould, 69 id. 220, does not apply. In that case there was no allegation that the parties had entered into a partnership between themselves. The only claim was that they were engaged in a joint adventure which had come to an end, and for that reason the plaintiff was entitled to an accounting and to the payment of his share. In Arnold v. Angell, 62 N. Y. 508, as in the case at bar, an action was brought for an accounting upon an allegation that the plaintiff and the defendant were copartners and the relief demanded was that the copartnership be dissolved and that there be an accounting and a division of the proceeds. At trial it was held that there was no partnership, but that in spite of that fact, because there was a joint adventure, the plaintiff was entitled to an account of the business. The General Term affirmed the interlocutory judgment, but this was reversed by the Court of Appeals saying that when the issue of partnership was decided against the plaintiff the action was at an end and defendant was entitled to judgment, citing Salter v. Ham, 31 N. Y. 321. To establish that parties are partners *inter sese* an agreement must be shown. Unless in some manner it is found to be the intention of the parties that they should become partners then the partnership cannot be said to exist. Participation in profits arising from the management of a business does not

Digitized by Google

alone create partnership. It is well settled that when a party is only interested in the profits of a business as a means of compensation for services rendered he is not a partner. Richardson v. Hughitt, 76 N. Y. 55; Curry v. Fowler, 87 id. 33; Cassidy v. Hall, 97 id. 159. An agreement for one to pay another who does not in any sense incur liability for losses a share of the profits by way of compensation does not create a partnership. Lansburg v. Walsh, 12 Misc. Rep. 124. The plaintiff testified under cross-examination: "I was to do the figuring at my home. For the services I was to render in looking after that job we agreed to divide the profits equally, and that is the same with all these other contracts for all services I rendered in superintending the work, hiring men and looking after it. I was to be paid for these services by dividing the profits equally and that applied to all this suit." Again "in making that estimate, giving the proposal and superintending the work I was to receive from Mr. Dunn for my services one-half of the profits." It is conceded that Dunn supplied all the capital, paid all the bills, took the contracts in his own name. Nowhere was Smith held out as a partner. If it be conceded that he was to receive one-half the profits he was not responsible for any of the losses. Neither from direct testimony nor reasonable inference can I find that he has established a partnership by a fair preponderance of credible evidence. If the relations as to each contract be looked at in the light of joint venture, he is not entitled to judgment in this action, based upon a partnership for a dissolution, a receiver and an accounting, under Heye v. Tilford and Arnold v. Angell, *supra*. If, as an employee to be paid upon the basis of half the profits, while to ascertain the amount due an accounting may be necessary, it cannot be had in this action. For the failure to establish the cornerstone of his case, the partnership, this complaint must be dismissed, with costs.

Complaint dismissed, with costs.

Digitized by Google

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* THE NEW YORK BUILDING LOAN BANKING CO., Defendant (In re MONTAGUE).

(Supreme Court, New York Special Term, July, 1904.)

Building loan bank — Loan to a member — His property rights upon its insolvency — Interest — Dues — Premium.

Where a person, desirous of getting a five per cent. mortgage on his premises paid off, enters in 1897 into an agreement with a building loan bank company by the terms of which it agrees to carry the mortgage, pay interest on it in the meantime and the principal upon maturity of the stock, and he agrees to pay it a premium, monthly dues on the stock in the meantime, give it a six per cent. mortgage for the amount of his mortgage and the premium, pay interest on that until the maturity of the stock and assign his stock to it, and these stipulations are mutually performed by the parties until a permanent receiver of the property of the company is appointed in 1903 upon its insolvency, and thereafter the subscriber to the stock petitions the court that the receiver pay him the difference between what he has paid in and the company has paid out, the court, in view of the fact that he is not only a borrower from the company but also a member of it, will give him no interest on any sum allowed him, will credit him with the dues he has paid as constituting a basis to fix his share of the net assets as a stockholder but will allow the receiver to retain the dues, and allow the company such proportionate part of the premium — which must be deemed to have been earned to some extent by it — as the period before insolvency and during which it kept its contract bears to the entire term of the contract.

APPLICATION by petitioner, a stockholder of the New York Building Loan Banking Co., asking that the receiver of the above-named company be required to pay him the difference between the amount paid in by him and the amount paid out by the company with interest, and in the event of the rejection of the method above refered to, he asks the court to direct the receiver to pay him $3,974.27 with interest thereon from the date of the appointment of said receiver, reserving amount of dues paid by petitioner and interest thereon as a basis for a claim to share *pro rata* with other stockholders at the final distribution.

Digitized by Google

Charles R. Hall, for petitioner.

Charles W. Dayton, for receiver.

DAVIS, J. The defendant, the New York Building-Loan Banking Company, is insolvent and in the hands of a permanent receiver. On or about December 1, 1897, the petitioner, Peter J. Montague, became the owner of 300 share of class "A" stock, issued by the defendant. His primary purpose in subscribing for 300 shares was to bring about the payment and cancellation of an existing mortgage of $25,000 on his premises, No. 60 Court street, Brooklyn. The company undertook to carry this mortgage of $25,000, agreeing to pay off the principal on or before the maturity of the stock, and in the meantime to pay the interest (five per cent.) on the mortgage. In consideration of the company's agreement to issue to him the 300 shares of stock, and to carry and finally to pay off the mortgage, Montague agreed to pay the company a premium of $5,000; to make a monthly payment of $75 dues on the 300 shares; to execute in favor of the company a mortgage of $30,000 on said premises, and pay interest thereon at the rate of six per cent., the interest to be paid monthly at the time of the payment of the dues. This made a total monthly payment of $226, and these payments were to continue until the stock matured, December 1, 1909. The premium of $5,000 is included in the $30,000 mortgage. He also assigned his stock to the company. The assignment as well as the $30,000 mortgage was made to secure the monthly payments of $226. It was expected that at the end of the maturing period, December 1, 1909, the 300 shares of stock would be paid up in full, and that Montague would have his premises free and clear of both mortgages. Both parties lived up to the agreement for sixty-nine months and fourteen days. The company then became insolvent and a temporary receiver was appointed September 14, 1903. Under an order of this court the $30,000 mortgage has been satisfied. No part of the $25,000 mortgage on the petitioner's premises has been paid. At the date of the appointment of the temporary receiver, Montague had made the following payments to the

Digitized by Google

company: $10,350 interest on the $30,000 mortgage, and $5,175 as dues on 300 shares of stock, making in all $15,525. In the meantime his stock has been maturing and the company has paid on account of interest on the $25,000 mortgage, at the rate of five per cent., the sum of $6,770.83. The petitioner asks that the receiver be required to pay him the difference between the amount paid in by him and the amount paid out by the company, that is $8,754.17, with interest for the average time to September 14, 1903, making a total of $10,286.12; and in the event of a rejection of the method just referred to, he asks the court to direct the receiver to pay him $3,974.27, with interest thereon from the date of the appointment of the receiver, reserving the amount of the dues paid by the petitioner and interest thereon as a basis for a claim to share *pro rata* with other stockholders at the final distribution. Neither of these methods of settlement appears to the court to be equitable, because they both substantially ignore the just claim of the company to a portion of the premium agreed to be paid by the petitioner. The relation between the petitioner and the company is not merely that of borrower and lender. He is also a member of the company. "The question emancipates itself, therefore, from legal or contract technicalities, and reduces itself to one of simple equity and fair play." Towle v. American B. L. & L. Soc., 61 Fed. Repr. 448. It follows, therefore, that whatever amount shall be allowed the petitioner, he is not entitled to any interest on that amount. He should be credited with the amount paid as dues, this amount serving as a basis for the fixing of his *pro rata* share of the net assets as a stockholder. Under authorities in this State and in the Federal courts, some part of the premium agreed to be paid should be regarded as earned by the company. Hannon v. Cobb, 49 App. Div. 480; Riggs v. Carter, 77 id. 580; Breed v. Ruoff, 54 id. 142; MacMurray v. Gosney, 106 Fed. Repr. 11; Choisser v. Young, 69 Ill. App. 256. The company kept its agreement for sixty-nine and seven fifteenths months. One hundred and forty-four months being the full term of the agreement, it should be allowed, therefore, to retain a

Digitized by Google

proportionate part of $5,000 as earned premium, *i. e.*, $2,412.04. Following the rules laid down in the cases referred to, I think it would be just to all parties to allow the company to retain $2,412.04 as earned premium and $5,175 as dues on the 300 shares of stock. And it should be credited with $6,770.73 interest paid by it on the $25,000 mortgage. If the total of these amounts be deducted from the whole amount paid by Montague, *i. e.*, $15,525, it will leave $1,167.13, which should be returned to the petitioner. This amount, however, should not be paid until final accounting, when it can be determined whether or not there is money sufficient to satisfy the claims of all others similarly situated. The diligence of the petitioner in making this application should not give him a preference over others having the same kind of claim against the company.

Ordered accordingly.

FREDERICK A. BURNHAM, Plaintiff, *v.* CHARLES L. FRANKLIN, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Libel — Answer of a publisher of a libelous article charging the plaintiff, president of a life insurance company, with knowingly swearing to a false report of its total income — The defendant can set forth no more of the article than the plaintiff seeks to recover upon but he may be given leave to amend his answer, deny he published the article as the plaintiff alleges he did, and deny that it, as shown in the complaint, is complete — Repetitions of former allegations and denials of an answer are improper — When irrelevant matter stricken out of an answer is available in mitigation of damages — That the plaintiff has failed in other suits for libel is immaterial — Matters competent in mitigation of damages.

Where a plaintiff sues one for damages, for publishing in his monthly magazine, of and concerning the plaintiff, an article virtually charging him with perjury in putting, in reports of the total income of the company for 1900, verified as correct by him as president, as published by the insurance departments of Connecticut, Wisconsin, New York and Massachusetts, the company's income, as reported to Connecticut, at a figure which he knew to be false, the defendant cannot allege in his answer the whole article nor any more of it than the part on which the plaintiff

Digitized by Google

seeks to recover, but may, by copy annexed, set up the article he published, deny he published the article alleged by the plaintiff, and allege that it as published by the latter is complete.

Repetitions of allegations and denials, contained in former paragraphs of the answer, must be stricken from subsequent ones as unnecessary.

As it is not necessary for the defendant to prove the truth of any portions of the article not pleaded by the plaintiff, matter relevant to those portions, upon being stricken out, must be stricken from the answer, but the same matter may be allowed as a part of a second and partial defense in mitigation of damages.

Allegations of the answer, that other publishers of publications have been unsuccessfully sued for libel by the plaintiff, are immaterial.

Allegations of the answer, that statements of the company, as contained in the above mentioned state insurance department reports, show its assets as decreasing, its liabilities as increasing, death claims as delayed in payment, and complaints from members as to the management, and further allegations that the defendant had received many letters from dissatisfied members calling for redress and a better management — all pleaded as separate or partial defenses and in mitigation of damages and alleged to be matters within the plaintiff's knowledge — are competent in mitigation of damages and on the question of malice.

Matters set up in mitigation will not be stricken out as irrelevant and redundant if the court has the slightest doubt as to its admissibility.

Allegations of the answer, that the defendant has examined certain books purporting to contain the report of the company and that he found the questions as to income and "disbursements" differently answered in different reports for the same year, are admissible for the same reasons, and this although the plaintiff is, by the article in question, charged only with swearing falsely as to reports relative to income.

An allegation of the answer, that the defendant knew the company had been excluded from doing business in Minnesota and other States, is immaterial where there is no proof that the exclusion, if any, had any relation to the libelous charge made by the plaintiff.

MOTION to strike out part of defendant's answer as irrelevant and redundant. The plaintiff is the president of a life insurance company and the defendant is the publisher of a magazine which published concerning the former the article complained of. The nature of the action and the material facts are stated in the opinion.

Digitized by Google

George W. Burnham, Jr. (James W. Osborne, George Burnham, and Sewell T. Tyng, of counsel), for motion.

Baldwin & White, opposed.

GIEGERICH, J. This is an action for libel. The article complained of is as follows: "In the published insurance reports the annual statement for the year 1900 of the Mutual Reserve the item 'Total income during the year' appears as follows: Connecticut insurance report, $14,623,413.85; Wisconsin insurance report, $14,304,983.54; New York insurance report, $5,333,969.80; Massachusetts insurance report, $4,438,926.95. Deducting the $8,158,523.52 of 'liens,' which the Massachusetts commissioner 'knocked out,' there would still be a discrepancy of $2,025,963.38 in the 'total income' as reported to Connecticut. In each of these States swearing to a false report is perjury, and Burnham (meaning the plaintiff) in each case took oath that the report was true and correct." The answer undertakes to set forth the entire article as published, as well that portion not complained of as that which is. In so far as it sets forth additional matter, the answer is clearly irrelevant and should be stricken out under Kelly v. Waterbury, 87 N. Y. 179, but the defendant should be allowed to amend his answer at folio 4 thereof by admitting and alleging the publication by him of the article, a copy of which is annexed to the answer, and by denying that he published the alleged libelous article as set forth in the complaint; and he should also have leave to amend his separate and first defense by adding to it an allegation setting forth the fact that the article as pleaded in the complaint is incomplete. These two amendments should be allowed, without costs. The plaintiff also moves to strike out subdivision 1 of paragraph 2 and subdivision 1 of paragraph 3, which consist of repetitions of allegations and denials set forth in paragraph 1. It is well settled that such repetitions are unnecessary and will be stricken out on motion. Stieffel v. Tolhurst, 55 App. Div. 532; Waltham Mfg. Co. v. Brady, 67 id. 102; White v. Koster, 89 Hun, 483; Blaut v. Blaut, 41 Misc. Rep. 572; Zacharias v. French, 10 id. 202. This will eliminate from the answer all of subdivision 1 of para-

Digitized by Google

graph 3 except the repetition of subdivisions 2, 3 and 4 of paragraph 2. The third ground of the motion is to strike out the two subdivisions of paragraph 2 of the answer, being the plea of justification, which are last numbered 3 and 4. As it is not necessary for the defendant to prove the truth of any portions of the article not pleaded by the plaintiff, and as the matter alleged in these paragraphs relates to the portion already directed to be stricken out of the first defense and justification, the motion should be granted, but they are allowed as a part of the second and partial defense in mitigation and the defendant should have leave to amend the second and partial defense beginning at folio 26, by adding the allegations contained in subdivision 3 and 4 of paragraph 2 of the answer, beginning at folio 20. The next ground of the motion is to strike out the allegations contained in subdivision 4 of paragraph 3, which relates to the fact that other publications have not been successfully sued for libel by the plaintiff, which is clearly immaterial (see Palmer v. New York News Pub. Co., 31 App. Div. 210) and should be stricken out. The sixth ground relates to a portion of subdivision 6 of paragraph 3 of the answer, to-wit, that it appeared from statements of the Mutual Reserve Fund Life Association, as contained in books published by the insurance departments of the four States mentioned in the article (referred to in a former part of the pleading), that the assets of the association were decreasing; that the liabilities were increasing; that the death claims were not being promptly paid, and that the defendant had received many calls in his office and letters from policy-holders and others inquiring if something could not be done to save and prevent the mismanagement of the association. The matter thus sought to be stricken out is pleaded as a separate and partial defense, as well as in mitigation of damages, and the plaintiff invokes the rule that mitigation does not mean the pleading of facts entirely disconnected with the original libel and which would of themselves constitute a separate and distinct libel from that originally complained of. Hess v. New York Press Co., 26 App. Div. 73; Mattice v. Wilcox, 147 N. Y. 624. While it is true that the facts objected to relate only to the financial con-

Digitized by Google

dition of the Mutual Reserve Fund Life Association, still, as the article complained of charges the plaintiff with having committed perjury with regard to such financial condition, it cannot be said that the information which the defendant thus possessed in respect thereto and the sources thereof have no bearing upon such charge. Matters set up in mitigation will not be stricken out as irrelevant and redundant if the court has the slightest doubt as to its admissibility. Townsh. Slan. & Lib. (4th ed.) 605, § 361, and cases there cited. Moreover, the rules by which the sufficiency of a pleading is ordinarily determined cannot be applied in all their strictness to a partial defense pleaded by way of mitigation of damages. Bradner v. Faulkner, 93 N. Y. 515; Morgan v. Bennett, 44 App. Div. 323. The answer avers that the facts thus objected to, as well as certain others within his knowledge, were published in the belief that they were true, and, applying the principles above laid down to the present case, it is apparent that such facts have a bearing upon the question of malice and hence should not be stricken out. These observations apply with equal force to the seventh ground of the plaintiff's motion relative to the same subdivisions of the answer, which alleges in effect that the defendant's attention had been first directed to the affairs of the Mutual Reserve Fund Life Association by a policy-holder of the association and that he had received numerous letters and calls from policy-holders complaining of its unsatisfactory condition and requesting the defendant to aid in obtaining a better management of the said association and redress the policy-holders' grievances, and the motion to strike out the same should, therefore, be denied. The eighth ground of the motion is to strike from the same subdivision the words "and disbursements." The defendant alleges that he has examined certain books purporting to contain the report of the Mutual Reserve Fund Life Association and found that the questions relating to income "and disbursements" were differently answered in different reports for the same year. While it is true that the article only charges the plaintiff with swearing falsely to the reports as to the income of the association, still as "income" may depend upon "disbursements" the mo-

Digitized by Google

tion should be denied under the rules above stated. The ninth ground is directed to matters contained in the same subdivision of the answer, which consist entirely of allegations pleaded in mitigation of damages as to the alleged mismanagement of the affairs of the Mutual Reserve Fund Life Association. As this comes within the same category as the sixth ground, the motion in respect thereto should be denied. The tenth ground is directed to an allegation in subdivision 7 of paragraph 3 of the answer, to the effect that the defendant has been informed and knew that the said association had not been permitted to continue its business in a large number of States, including the State of Minnesota. Since it has not been made to appear that such association was excluded from any of the States mentioned in the alleged libelous article, or on any ground having any relation to the charge complained of, the allegation so objected to is clearly irrelevant and immaterial and consequently should be stricken out. The eleventh ground is directed to a certain further allegation in the same subdivision, wherein it is alleged that the defendant has read the report of the Hon. Louis F. Payn, Superintendent of Insurance of the State of New York, during the year 1899 on the condition of the said association, and had consultation with various insurance experts regarding the affairs of the said association above referred to. As it is not shown what information was obtained from such sources, this is irrelevant and can be used neither in justification nor mitigation of the charge of perjury, and, therefore, should be stricken out. The motion is, therefore, in the respects herein noted, granted; but in all other respects denied, with leave to the defendant to amend his answer as herein indicated, without costs.

Ordered accordingly.

Digitized by Google

JOHN YOUNG, Plaintiff, *v.* THE AMERICAN BANK, Defendant (Action No. 1).

(Supreme Court, New York Special Term, July, 1904.)

Action on an instrument, alleged to be a certificate of deposit — When it is a mere receipt, and not actionable by an assignee thereof, where there has been no transfer of it to him other than by endorsement and delivery.

An instrument reading: "Mexico. $5,000. Certificate of deposit in favor of The International Money Box Company. Mexico, February 1, 1902. We hereby certify that we have on this date placed to the credit of the International Money Box Company of New York and Chicago the amount of $5,000 (five thousand dollars) United States currency. This amount is left on deposit in this bank with the understanding that it is not to be withdrawn for two years, counted from this date, in consideration of which we hereby agree to pay the International Money Box Company straight interest at the rate of 7% (seven per cent.) per annum. The American Bank. F. J. Dunkerly, cashier" is not a negotiable instrument for the payment of money, contains no promise to pay the deposit, is a mere recital evidencing the payment, is assignable only as any other chose in action is assignable, and, when merely endorsed and delivered for value to an assignee, gives him no cause of action upon which he can recover thereon of the bank or procure an attachment on the action.

MOTION to vacate a warrant of attachment.

Alexander & Colby (John Quinn and Henry G. Wiley, of counsel), for motion.

Hastings & Gleason, opposed.

GIEGERICH, J. A number of questions are discussed in the briefs, but only a single one need be considered, and that is, whether a cause of action is set forth in the papers on which the attachment was procured. The allegations concerning the plaintiff's claim, as set forth in the affidavit, are as follows: That on or about the 1st day of February, 1902, the defendant for value made and delivered to the International Money Box Company its certificate of deposit (so-called) in the following form: "Mexico. $5,000. Certificate of deposit in favor of The International Money

Digitized by Google

Box Company. Mexico, February 1, 1902. We hereby certify that we have on this date placed to the credit of the International Money Box Company of New York and Chicago the amount of $5,000 (five thousand dollars) United States currency. This amount is left on deposit in this bank with the understanding that it is not to be withdrawn for two years, counted from this date, in consideration of which we hereby agree to pay the International Money Box Company straight interest at the rate of 7% (seven per cent.) per annum. The American Bank. F. J. Dunkerly, cashier. The American Bank. Ricardo Colin, ass't manager." It is further alleged that prior to the maturity of said certificate the same was for value indorsed by the International Money Box Company and thereafter was for value transferred and delivered to the plaintiff, who is now the holder and owner thereof. Furthermore, that at maturity the certificate was presented for payment and payment demanded and refused and that the certificate remains in the hands of the plaintiff wholly unpaid. It is evident at a glance that the theory upon which the attachment was procured is that the so-called certificate is an instrument for the payment of money which could be assigned by indorsement and delivery. On the other hand, on behalf of the defendant, it is insisted that the paper is not a negotiable instrument with the well-recognized characteristics of such instruments, but is a mere receipt containing no promise to pay whatever, quoting upon this point, among other authorities, Daniel on Negotiable Instruments as follows: "A simple certificate of deposit containing no words of promise to pay the amount is nothing more than a receipt and could not be the basis of an action against the bank, nor would it be a transferrable security; * * * the word 'certify' adding no additional force to the instrument as purporting a contract." 2 Daniel Neg. Insts. (5th ed.), § 1704. In Hotchkiss v. Mosher, 48 N. Y. 478, in speaking of a paper quite similar in its character to the one in hand, the court said (p. 482): "The certificate was simply an acknowledgment of so much money deposited with the bank. It was of the same force and effect as a receipt for money. The word 'certify' adds no additional

Digitized by Google

force to the instrument, as purporting a contract. It contained no promise on the part of the defendants; and if it had, the portion which operated as a receipt for money was quite as capable of separation from that part which evidenced a contract as in the case of a bill of lading. A certificate or acknowledgment that another has deposited a sum of money, has the effect of an acknowledgment by one party that he has received a sum of money from another. A simple certificate like the one in question is not the basis of an action like a promise in writing, but would be evidence, like a receipt, to raise an implied promise to pay in an action for money had and received. We are of the opinion that parol evidence was admissible to explain the certificate in the same manner as in the case of a receipt." So, too, in the more recent case of First Nat. Bank v. Clark, 134 N. Y. 368, the same court, speaking of a paper in the following form, "Deposited by Sliney & Whelan with Judson H. Clark, Banker, Scio, N. Y., December 5, 1882. Discount, $3,412.50. F. M. Babcock," said (p. 372): "The appellant calls it (the paper) a 'certificate of deposit,' but such designation is not accurate. It is, in fact, what the witnesses for both plaintiff and defendant assert it to be, a deposit slip, or deposit check. The use of the deposit slip is well understood. It constitutes an acknowledgment that the amount of money named therein has been received. It is a receipt and nothing more. No promise is made to pay the sum named on return of the paper; nor is it expected, either by the depositor or depositary, that it will ever be presented to the bank again unless a dispute should arise as to the amount of deposit, in which event it would become important as evidence. It is not intended to furnish evidence that there remains money in the bank to the credit of a depositor, but to furnish evidence as between depositor and depositary that on a given date there was deposited the sum named. It may all, or nearly all, be checked out at the moment of making the deposit slip, but the depositor will not be refused it on that account, for long established usage has fixed its status in banking as a mere receipt, an acknowledgment that the depositor placed the amount named

Digitized by Google

therein on deposit. It is not proof of liability, and it will not support an action against the bank. Hotchkiss v. Mosher, 48 N. Y. 482; 2 Daniel Neg Insts., § 1704. Should a suit be brought on the debt, however, it would furnish evidence as to time of deposit and amount, but it has no other use unless it be to assist in the settlement of a dispute out of court. The delivery of the deposit slip, therefore, did not operate to assign the debt. There was no writing made or delivered to the plaintiff other than the check and deposit slip, both of which we have already considered." Calling the paper before us a certificate of deposit does not alter its true character or import into it the express promise to pay which is a characteristic of negotiable instruments and which is a part of certificates of deposit properly so called. In volume 5 of the American and English Encyclopædia of Law (2d ed.), at p. 801, a certificate of deposit is defined as "a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to bearer, to the order of the depositor, or to some other person or to his order." I am clearly of the opinion, therefore, that the papers on which the attachment was procured are fatally defective in failing to show any valid assignment of the claim in question. Such an assignment cannot be made merely by indorsing the paper, but would have to be made in the same manner as any other chose in action is assigned.

Motion granted, with ten dollars costs.

JOHN YOUNG, Plaintiff, *v.* THE AMERICAN BANK, Defendant (Action No. 2).

(Supreme Court, New York Special Term, July, 1904.)

Certificate of deposit — Assignable by endorsement and delivery where it possesses negotiable attributes — Demand — Affidavit of demand and non-payment on information and belief, when insufficient.

An instrument reading: "Mexico. This is to certify that the International Money Box Co. of New York has a deposit of the amount of three hundred dollars ($300) U. S. currency in this

Digitized by Google

bank, which deposit bears interest at the rate of seven per cent. (7%) per annum, payable annually. This certificate is due two years from this date, or on the seventh of April, nineteen hundred and four, and will be cashed only upon being returned to the bank by the International Money Box Co. of New York or their order. City of Mexico, April 7, 1902. The American Bank. F. J. Dunkerly, cashier" must be deemed transferable by endorsement and delivery as it has negotiable attributes, these consisting in the promise to pay the depositor or order and in the provision for a return of the instrument before payment will be made.

Demand of payment must be made before a cause of action can accrue as a certificate of deposit is not due until demand made.

Where the certificate is to the depositor's order the demand must correspond with the obligation of payment and that requires presentation to the bank of the certificate, properly endorsed.

Where an affidavit, made in an action brought by an assignee of the certificate to recover upon it of the bank and to procure an injunction in the action, states demand and refusal of payment on information and belief, without stating the sources of information or the grounds of belief, it is insufficient to support the injunction.

MOTION to vacate a warrant of attachment.

Alexander & Colby (John Quinn and Henry G. Wiley, of counsel), for motion.

Hastings & Gleason, opposed.

GIEGERICH, J. The five instruments upon which this action is proposed to be brought are distinctly different in their terms from the one involved in Action No. 1, herewith decided, the dates varying, and read as follows: "Mexico. This is to certify that the International Money Box Co. of New York has a deposit of the amount of three hundred dollars ($300) U. S. currency in this bank, which deposit bears interest at the rate of seven per cent. (7%) per annum, payable annually. This certificate is due two years from this date, or on the seventh of April, nineteen hundred and four, and will be cashed only upon being returned to the bank by the International Money Box Co. of New York or their order. City of Mexico, April 7, 1902. The American Bank. F. J. Dunkerly, cashier. The American Bank. Ricardo Colin, ass't manager." While there is no promise to pay in so many words still I think the language of the

Digitized by Google

last paragraph of the instrument is susceptible of no other construction that such a promise to pay at the expiration of two years, either to the International Money Box Company or their order. It is noticeable in this case, as distinguished from the other, that the paper upon its face is treated as possessing negotiable attributes in that it provides for payment either to the original holders or to their order, and, furthermore, provides for the return of the certificate before payment will be made. This differentiates it in a marked degree from writings like that referred to in the memorandum herewith handed down in Action No. 1, which contains no promise to pay and no provision for transference by order, nor any requirement that it be produced when payment is demanded. Because of these facts the reasons set forth in the authorities quoted from in that memorandum do not apply and it must be held that the indorsement and delivery in this case constituted a sufficient assignment. The attachment is challenged, however, on other grounds, namely, that the allegations respecting the presentment and demand and nonpayment of the instrument being made upon information and belief, and not upon positive knowledge, should have been supported by evidence of the facts in order to enable the court to determine whether the affiant had knowledge of the facts stated. The statements in the affidavit upon which the attachment was procured bearing upon this point are as follows: "That prior to the maturity thereof deponent caused the said certificate of deposit to be forwarded to the City of Mexico for payment, and upon information and belief the said certificate was duly presented for payment to the American Bank, at the City of Mexico, at the maturity thereof, and payment thereof demanded and refused, and the said certificate was duly returned to the plaintiff unpaid, and that the same now remains in his hands wholly unpaid." It is a familiar rule that affidavits upon information and belief should set forth the sources of information and the grounds of belief, and certainly this rule ought not to be relaxed where a drastic provisional remedy like attachment has been resorted to; and it has been applied repeatedly in attachment cases. Murphy v. Jack, 142 N. Y.

Digitized by Google

215; Steuben County Bank v. Alberger, 78 id. 252; Hunt v. Robinson, 52 App. Div. 539, and numerous cases there cited. Since this defect goes to the sufficiency of the affidavit it is a matter of substance and relates to the merits, and consequently it was not necessary to specify it under Rule 37 of the General Rules of Practice, which by its terms relates only to irregularities. Martin v. Aluminum Plate Co., 44 App. Div. 412; Andrews v. Schofield, 27 id. 90, 93. That a certificate of deposit is not due until actual demand has long been settled in this State. Cottle v. Marine Bank, 166 N. Y. 53, 58; Downes v. Phœnix Bank, 6 Hill, 297; Payne v. Gardiner, 29 N. Y. 146; Pardee v. Fish, 60 id. 265; Howell v. Adams, 68 id. 314; Boughton v. Flint, 74 id. 476; Munger v. Albany City Nat. Bank, 85 id. 581; Smiley v. Fry, 100 id. 262. In Cottle v. Marine Bank, just cited, the instrument in question was as follows: "John J. P. Read has deposited in this bank one thousand dollars to the credit of himself and payable to his order hereon, with interest at three per cent. per annum," and the court said: "The plaintiffs insist that the commencement of the action was a sufficient demand. As between maker and holder a promissory note payable upon demand is due forthwith, and, therefore, a demand with tender of the note to the maker is not a condition precedent to the maturity of the cause of action. The note may be surrendered upon the trial. But in this case the paper requires payment upon a specified condition, namely, 'to his (the depositor's) order hereon,' and the demand must correspond with the obligation of payment, and that requires the presentation of the certificate to the bank, properly indorsed, unless the bank should waive the indorsement. The action is at law, and the right of recovery had not accrued when it was commenced." Under this authority presentment and demand of payment were necessary before the cause of action accrued, and inasmuch as the affidavit is defective for the reasons just indicated upon these points, the motion to vacate must be granted.

Motion granted, with ten dollars costs.

Digitized by Google

WILLIAM L. CONDIT, Plaintiff, *v.* THOMAS S. GOODWIN et al., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Foreclosure — What are fixtures, as between the mortgagee and conditional vendors thereof, where they have been placed on the premises at the instance of the mortgagor after he had mortgaged the premises.

Gas fixtures placed on real estate are personalty as not essential to the use for which the real estate is appropriated, and, when placed on mortgaged premises at the request of the mortgagor, the mortgagee can assert no lien or priority in regard to them as against the creditor in an action brought by the mortgagee to foreclose the mortgage.

A steam-heating plant and hot-water generating plant placed on the mortgaged premises under a written agreement, made between the mortgagor and vendor alone and duly filed in the office of the register of the city of New York, providing that all materials placed in the building should remain the property of the vendor until full payment, has the effect of preserving to the things sold their character as personalty, and the mortgagee has no lien on them.

Conditional vendors, such as are above described, holding claims, which must be deemed collateral, claiming priority over the mortgage and absolute ownership of the personalty placed by them on the premises, are neither proper nor necessary parties to the mortgagee's action of foreclosure and as to them the complaint must be dismissed.

ACTION to foreclose a mortgage.

James, Schell & Elkus, for plaintiff.

Abrams & Lasky, for defendants.

GILDERSLEEVE, J. This is an action to foreclose a first mortgage executed in 1888 on real property for the nonpayment of the principal sum of the mortgage, as well as the failure of the mortgagors to pay the interest and taxes, and

Digitized by Google

to sell the mortgaged property according to law, free from any prior liens thereon. The defendant the Reedy Elevator Company has answered, claiming title to an elevator and appurtenances alleged to have been installed in the building by it, under a conditional bill of sale, dated October 31, 1902, on which, as it further alleges, $1,000 of the purchase price are still unpaid. The defendant Kirk answers, setting up a lien for $1,435.95 for steam fittings, under an alleged conditional bill of sale, filed on December 2, 1902. The defendants Baldenger and Kupfurman answer, setting up a lien on gas fixtures amounting to $822.74, under an alleged conditional bill of sale dated February 20, 1903. There is practically no dispute as to the facts of this case. The main question of law raised by the facts, aside from the claim that the answering defendants are not necessary or proper parties to this action, is this: Do machinery, materials and appurtenances supplied under the aforesaid contracts retain the character of chattels, or have they become fixtures and a part of the realty, covered by the mortgage, that must be sold under the decree herein? The gas fixtures are personalty and not realty, and the plaintiff, by virtue of his mortgage, has acquired no lien thereon and no title or interest therein. Had there been no conditional sale of these gas fixtures they are not of such character and so annexed to the realty as to merge in the freehold. They are not of a permanent nature and essential to the use for which the realty is appropriated. The defendant the Reedy Elevator Company completed the installation of an elevator in the premises in question on March 31, 1903. The contract provides that the title and possession of the elevator shall remain in the Reedy Elevator Company until the final payment shall have been made. The terms of payment are as follows: Four hundred dollars in cash when the steel girders and overhead beams are in place; $1,000 in cash when the electric engine is on foundation and car in place in hatchway; $1,000 in a promissory note payable ninety days after the completion of the contract; $1,400 have been paid, but the $1,000 note given in accordance with the terms of the contract, as the third and last payment, has not been paid. I am of the opinion that this elevator and its

Digitized by Google

appurtenances must be regarded as fixtures or as annexations to the realty. As to this defendant, the question of the validity of the agreement between it and the owners of the premises, by which it was sought to impress upon these fixtures the character of chattels and establish a lien superior to the lien of the mortgage under foreclosure, does not arise, for the reason that the evidence shows that the contract between the owners and this defendant has been fully carried out and performed, and that the title to the elevator and its appurtenances passed to the owners of the equity of redemption of the premises and became subject to all mortgages thereon. The defendant Kirk installed in the building the steam-heating apparatus and the hot-water generating plant. The contract was entered into on November 17, 1902, and contained a clause providing that all materials placed in the building should remain the property of the defendant Kirk until the same had been fully paid for in cash. Kirk has not been paid in cash, and there is now due and owing to him the sum of $1,434.95, with interest from April 1, 1903. It is his claim that he is not a necessary or a proper party to the action; that the apparatus installed by him are chattels, of which he is the owner and entitled to the possession, or the balance unpaid on account thereof. The contract was duly filed in the office of the register, and it is the claim of said Kirk that, by force of the statute applicable hereto and of the undisputed facts herein, the said apparatus are chattels belonging to him. I think the Kirk contract was a valid agreement between him and the owners of the premises, and that, by reason thereof, although the mortgagee was not a party to the contract under the facts herein appearing, the property supplied by Kirk, of the character above mentioned, has retained its character as personal property. Duntz v. Granger Brew. Co., 41 Misc. Rep. 177; Tifft v. Horton, 53 N. Y. 377; Sisson v. Hibbard, 75 id. 542; Kerby v. Clapp, 15 App. Div. 37; New York Investment Co. v. Cosgrove, 47 id. 35. As to all of the defendants above mentioned, although I have briefly discussed their claims, I am of the opinion that they are not necessary or proper parties to the action. At the most their claims are collateral and interest the plaintiff indirectly.

Digitized by Google

Their answers set up no defense to the action brought by the plaintiff. They assert a priority over the plaintiff's mortgage. Whatever the merits of the claims of these may be, it cannot be said that, under the circumstances of this case, they can be paid the balance due them respectively out of the proceeds of the sale of the realty. These defendants urge that by virtue of the terms of the conditional agreements under which they placed in the premises the various kinds of property they still are the owners of the same and hold the title thereto. They object to the sale of the particular property they claim, for the reason that it never has attained the character of realty, and that the plaintiff, as mortgagee, under his mortgage, never acquired any interest therein. The ownership of personal property and claims to priority over the plaintiff's mortgage cannot be properly determined in a foreclosure action. Defendorf v. Defendorf, 43 App. Div. 166. These questions belong to actions respecting personal property, and the law provides ample provision therefor. The alleged rights of these defendants, as by them asserted, are not subject to the mortgage, but superior thereto and prior to all other liens. They are not necessary or proper parties to the foreclosure, and as to all of them the complaint must be dismissed. Corning v. Smith, 6 N. Y. 82; Lewis v. Smith, 9 id. 513; Industrial Bank v. Goldman, 75 id. 127; Gardner v. Lansing, 28 Hun, 413. The three defendants above named may each have a bill of costs to be taxed by the clerk and paid by the plaintiff. The plaintiff may have taxable costs and an additional allowance of $2,000.

Ordered accordingly.

Digitized by Google

JOSEPH E. VANDEWATER, as Administrator, Etc., Plaintiff, *v.* THE MUTUAL RESERVE LIFE INSURANCE CO. et al., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Calendar practice — When an action at law becomes equitable and proper to be put on the Special Term calendar — Preference where an administrator is sole plaintiff.

An action at law becomes equitable and triable by the court where the sole original defendant, an insurance company holding a fund all of which the plaintiff claims and none of which the insurance company claims, interpleads, and makes a defendant, another claimant of the fund; and where the sole plaintiff is an administrator he is thereafter entitled to put the case on the Special Term calendar and have it preferred under Code Civ. Pro., § 791, subd. 5.

MOTION to strike cause from Special Term Calendar.

George W. Sandford, for plaintiff.

Forbes J. Hennessy, for defendant Ransom.

George Burnham, Jr., for defendant life insurance company.

GILDERSLEEVE, J. The motion is for a preference, on the ground that an administrator is the sole plaintiff. Code, § 791, subd. 5. It is objected that the case is improperly on the calendar of the Special Term, for the reason that the amended complaint demands a money judgment only. Section 968 of the Code provides that an action wherein the complaint demands judgment for a sum of money only must be tried by a jury, unless a jury trial is waived or a reference ordered. In the case at bar no reference has been ordered and the plaintiff has not waived a jury trial. The case was put on the Special Term Calendar and noticed for trial at that term by the defendant Ransom only, who also makes this motion for a preference. The action was originally brought against the defendant insurance company alone.

Digitized by Google

Subsequently, on motion of the said insurance company, Ganney P. Ransom, as executrix, etc., was interpleaded and made a party defendant. The plaintiff and defendant Ransom have no right of action at law against each other, but by an order of interpleader they have been brought together to litigate the question which of them has the better right to the fund in the hands of the defendant insurance company, which last-named defendant makes no claim to the said fund on its own behalf, but stands ready and willing to pay it over to whichever party is adjudged to be entitled thereto. This action comes within the authority of the cases of Clark v. Mosher, 107 N. Y. 118, and Windecker v. Mut. Life Ins. Co., 12 App. Div. 73. In the first case it was held that where, in an action at law, a third party, claiming to own the cause of action, has been brought in and substituted as defendant and the original defendant discharged on payment into court of the amount of the demand, in pursuance of section 820 of the Code, the action thereafter becomes an equitable one, triable by the court, and neither party has a right to a jury trial. The facts in that case differ from those in the case at bar in that there the original defendant was discharged upon paying the fund into court, while here the insurance company remains a party and holds the fund subject to the directions of the court. This difference, however, does not take this case out of the principle there laid down by the Court of Appeals. Still more directly in point here is the case of Windecker v. Insurance Co., above cited, as in that case the original defendant was not discharged by the order of interpleader, and the court held that by an order of interpleader and the service of the supplemental complaint and answer in the action to determine the ownership of the fund equitable issues were created, and whatever the action may have originally been, it thenceforth became an action in equity. It must be held, therefore, that the case at bar is properly on the Special Term Calendar and that it is entitled to a preference under section 791, subdivision 5, of the Code.

Ordered accordingly.

Digitized by Google

SETH M. TUTTLE, as Substituted Trustee under the Deed of WILLIAM H. IMLAY to CHESTER ADAMS, Plaintiff, *v.* FIRST NATIONAL BANK OF PATERSON, N. J., et al., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Trust for life — Interest acquired by a trustee upon a purchase of stock in a bank — Rights of one, claiming under the life tenant, in a fund the trustee received upon the bank's liquidation of its affairs and redemption of its stock.

Where a trustee, appointed by the court under a testamentary trust created by a testator in 1857 to sell his real estate, invest and reinvest the proceeds in bank stock and pay one (still living) of his three daughters one-third of the dividends, income and profits during her life — with directions as to the disposal of the principal of her share upon her death — purchases in 1884, stock in a domestic bank, he thereby acquires in all its assets — whether called capital, surplus or undivided profits — as they were in 1884, an interest commensurate with his shares; and where, through a subsequent trustee, the life interest of the life tenant in the stock, its dividends and profits, is acquired by a foreign bank and thereafter and in 1903 the trustee, upon the domestic bank's liquidating its affairs and retiring and redeeming its stock, receives a fund representing his interest as trustee in the capital, surplus and undivided profits, the foreign bank is not, when the fund becomes available for distribution, entitled to the whole of it but only pro rata to the undivided profits earned between 1884 and 1903 and, in addition, to the income of the remainder of the fund while the life tenant lives.

ACTION for an accounting.

Wells & Snedeker, for plaintiff.

Van Ingen, Seibert & Paddock, for defendant First National Bank of Paterson.

SCOTT, J. This is an action for an accounting by the plaintiff, Seth M. Tuttle, as substituted trustee, concerning

Digitized by Google

a fund of $4,575, being the distributive share set apart upon the dissolution of the National Broadway Bank for sixty-one shares of stock in the bank standing in his name as trustee, and to determine the respective rights of the parties herein to such fund.

The trust under consideration was created in 1857 by a deed from William H. Imlay to Chester Adams, both of the city of Hartford, Conn., the subject-matter of which was originally certain lands in the State of Michigan. By the terms of the trust the trustee was directed to sell the lands and invest the proceeds "in good bank stocks in his own name as trustee, and to sell said stocks and invest the proceeds thereof in other good bank stocks, in his own name as trustee, from time to time and as often as said trustee may deem best," and to pay over "the rents, issues, dividends, income and profits of said lands and stocks, and all investments and reinvestments of the proceeds of the sale thereof" to the three daughters of the creator of the trust, Georgiana, Isabella and Alice, for their lives, with directions for the disposition of the principal upon the death of each. Georgiana is the only daughter now living and is a party to this action.

Out of the proceeds of the sale of the Michigan lands George M. Bartholomew, the successor trustee to Chester Adams, purchased in 1884 the sixty-one shares of stock in the national bank above referred to. Bartholomew afterward resigned as trustee, and thereupon Philo P. Hotchkiss, the husband of the defendant Georgiana I. Hotchkiss, was appointed his successor by an order of the Supreme Court of New York, entered in Kings county.

In the course of the administration of the trust by Hotchkiss, he pledged the stock in the National Broadway Bank with this defendant, the First National Bank of Paterson, as security for a loan made by it for the benefit of a business carried on by his wife, the defendant Georgiana I. Hotchkiss. In a suit heretofore brought by the First National Bank of Paterson against the National Broadway Bank and the plaintiff herein to acquire title to this stock, the Court of Appeals decided that this defendant had lawfully acquired the life interest of Georgiana I. Hotchkiss in the same. The

Digitized by Google

opinion of the court is reported in 156 N. Y. 459. A reference to this decision renders unnecessary a more detailed statement of the facts out of which such suit arose.

In April, 1903, the National Broadway Bank went into dissolution under the laws of the United States, and thereupon sold all its assets to the Mercantile National Bank, and went out of business. At the time of going into liquidation the National Broadway Bank had a considerable amount of surplus and undivided profits which it had accumulated for a period prior to its dissolution. To the fund of $4,575 received by the plaintiff trustee upon such dissolution this defendant the First National Bank of Paterson now makes claim to a portion thereof equal to a *pro rata* share of the surplus and undivided profits which had accumulated up to the time of the bank's dissolution.

The plaintiff on his part insists that the whole proceeds of the redemption of the stock should be paid to him. The decision of the Court of Appeals above referred to amounted to a determination that the defendant bank had become vested with the whole of Georgiana Hotchkiss' interest in the stock. That the judgment only ordered the dividends thereafter declared to be paid over to the bank did not lessen the effect of this adjudication. The only practical question then before the court was as to the application of future dividends, but the decision applies equally to profits earned upon the investment of the trust fund, although accumulated by the Broadway bank, and not declared by way of dividends. The question to be decided then is as to how much of the money paid for the shares upon liquidation belonged to Georgiana Hotchkiss. In determining this question I do not deem the price at which the shares were purchased as material, and indeed the evidence upon that point is far from precise. Properly speaking the shares of stock were not in themselves property, but were merely evidence of the interest or ownership of the holder in the assets of the bank. Thus when the trustee purchased the sixty-one shares of Broadway National Bank stock, he thereby acquired a property interest in that proportion of the property and assets of the bank which was represented by the shares bought. It was shown by a report

Digitized by Google

made by the officers of the bank in compliance with the National Banking Act that on December 20, 1884, the assets of the bank consisted of $1,000,000 surplus, and $518,876.26 of undivided profits. In investing the trust fund in the bank stock the trustee acquired therefor a proportionate interest in and ownership of this capital, surplus and undivided profits, and these taken together constituted the available working capital which was thereafter to earn profits and resultant dividends. From the time of the investment Mrs. Hotchkiss was entitled to receive all of the earnings or profits realized upon the capital, but was entitled to receive no part of the principal. The Broadway bank has made considerable profit since 1884, a portion of which has been declared as dividends. These the defendant bank has received. It appears, however, that at the time of its liquidation, while the capital and surplus of the Broadway bank had remained as they had been in 1884, the undivided profits had increased by $383,510.40. This sum represents, as accurately as may be determined from the evidence, the earnings and profits of the bank accumulated since the trustee purchased the stock, in addition to the earnings and profits which had been distributed in dividends. The proportion of these increased, but undistributed, earnings which was represented by sixty-one shares of stock belonged to Mrs. Hotchkiss, and while she, or her assignee, could not actually receive these profits before liquidation, the amount is now available. Matter of Rogers, 161 N. Y. 108. The claim of the defendant bank to the whole sum representing capital and surplus is untenable, because to allow it would be to turn over to it a considerable portion of the capital of the trust fund, for as has been said the purchase of the shares in 1884 amounted to an investment in the assets and property of the bank as they then were, whether called capital, surplus or undivided profits. The sole right of the life tenant was to the profits derived from that investment, and those profits are represented by the increase in the undivided profits, in addition to the dividends declared and paid. The amount of the increased profits belonging to the life tenant should be estimated from the date of the purchase by the trustee, rather

Digitized by Google

than from the date that the defendant bank acquired the life tenant's interest, because at the time of such acquisition the profits earned by the investment since the date of the purchase by the trustee belonged to the life tenant. A computation shows that the undivided profits earned and accumulated from the time the trustee purchased the stock down to the time of the liquidation amounted to $9.5877 per share or $584.45 for the sixty-one shares held by the trustee. The defendant bank, as successor in interest of Georgiana Hotchkiss is, therefore, entitled to receive this sum out of the amount paid to the trustee upon the liquidation of the Broadway bank and the retirement of its share stock. Whatever remains in the trustee's hands should be reinvested in good bank stock as the creator of the trust directed, and the income or dividends realized thereon should be paid to the First National Bank of Paterson during Mrs. Hotchkiss' lifetime. The trustee is, I think, entitled only to commissions upon so much as is paid over to the defendant bank under the decree to be entered in this action. The dividends declared and heretofore paid did not pass through his hands, but were paid directly to the Paterson bank by the Broadway bank. It appears that there was a real and irreconcilable difference between the parties as to how the money should be divided. Neither has substantiated its entire claim. The plaintiff and the defendant bank should have their taxable costs, and the plaintiff should have in addition an extra allowance of $175, and the defendant bank an extra allowance of $25, the costs and allowances to be paid out of the fund now in court, the sum to be retained by the trustee and that to be paid to the defendant bank being thereby diminished *pro rata*.

Judgment accordingly.

Digitized by Google

ELLA E. GORE, Plaintiff, *v.* FRANKLIN P. GORE, Defendant.

(Supreme Court, St. Lawrence Special Term, July, 1904.)

Action for annulment of marriage — When a court of equity will allow the plaintiff wife counsel fees and expenses.

A court of equity has inherent power to and will allow a married woman counsel fees and expenses to enable her to carry on an action she has begun for the annulment of her marriage upon the ground of her husband's physical incapacity where she shows upon the motion that he knew before marriage of his incapacity and had admitted that he married her for the sole purpose of getting a housekeeper.

MOTION for alimony and counsel fees in an action to annul a marriage.

Kellogg & Mulligan, for plaintiff.

Conger, Orvis & McLear, for defendant.

KELLOGG, JOHN M., J. Plaintiff makes this motion for alimony and counsel fees in an action to annul the marriage between her and the defendant on the ground of his physical incapacity. The sharp conflict of authorities upon this question makes it somewhat interesting. The Special Term case of Allen v. Allen, 8 Abb. N. C. 175, decided January, 1880, by Donohue, J., and Anonymous, 15 Abb. Pr. (N. S.) 307, Judge Davis at Special Term in 1874: "From the argument and the consideration I have given them (the questions), with my brethren of the general term," sustain the power of the court to grant the motion. Bartlett v. Bartlett, 1 Clarke Ch. 460, decided by the vice-chancellor in 1841; Meo v. Meo, Judge O'Brien, at New York Special Term in 1888, 2 N. Y. Supp. 569; Herron v. Herron, 28 Misc. Rep. 323, decided by Judge Dunwell, July, 1899, held there is no authority for such a motion.

The question has not been squarely decided by the Appellate Division or the Court of Appeals, and in view of this

Digitized by Google

conflict of authority may well be considered an open one to be decided upon its merits, rather than by offsetting the decisions in the one direction against those in the other and determining which has the greater number or weight. While the question has not been free from doubt, and authorities have disagreed, it is now the settled law of this State that in actions to have the marriage declared null, the court has the power to grant alimony and counsel fees, not from the provisions of the Code or the statutes, but from the inherent power and authority of a court of equity. Higgins v. Sharp, 164 N. Y. 4.

The court says (at p. 9): "It seems to us, therefore, that actions to *annul a marriage are governed, with respect to alimony and counsel fees, by the same principles as all other actions of divorce.* When the court was vested with jurisdiction in such cases, the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached, upon the plainest principles of reason and justice."

The same principle was recognized in Griffin v. Griffin, 47 N. Y. 134, the court saying (at p. 137): "Yet it has been the constant practice of the Court of Chancery, both before and since the Revised Statutes, to make equitable provision for all these matters; and in so doing, it has been guided by the decisions of the ecclesiastical courts of England in similar cases. * * * This has not been done upon the theory that the Court of Chancery of this State was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that (except in special cases hereafter referred to) it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes; but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the Court of Chancery, in those actions for divorce which by the English law are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensible to its proper exercise, and not in conflict with our own statutory regulations on the same subject."

Digitized by Google

It would seem that the above cases and the quotations from them would indicate that there ought to be no question of the power of a court of equity to compel a defendant in an action of this nature to furnish the necessary means for the conduct of the action and the support of the wife during its pendency, and it becomes interesting to see in what manner the authorities to the contrary arose and upon what basis they rest. The position is more pronounced when we remember that the power to grant alimony in cases of annulment rests solely upon the inherent powers of the court and upon the practice in the ecclesiastical courts of England, which the Courts of Chancery are supposed to have borrowed, and when we see that, in England, in an action brought by the wife to have the marriage annulled upon the ground of the impotency of the husband, the court uniformly grants alimony and suit money in the same manner in which our courts grant them in actions for divorce. Reynolds v. Reynolds, 45 L. J. (N. S.) 89; M. v. C., 41 id. 40.

"After proof of a marriage in fact, alimony pending the suit will be allotted whether it be commenced by or against the husband, not only in cases of impotency but in all cases of nullity of marriage, and in suits for restitution of conjugal rights or for divorce by reason of adultery or cruelty." Shelf. Marr. & Div., 17 Law Lib. (N. S.) 347 (587), citing Bain v. Bain, 2 Add. 253; Smyth v. Smyth, id. 254.

The line of divergence arises in Bartlett v. Bartlett, decided by the vice-chancellor in February, 1841, 1 Clarke Ch. 460. There the wife's father had agreed to support her and make no charge to the husband therefor, and she had left him and was living with her father. The court assumes that at the time of the marriage the defendant was ignorant of the impotency, if it existed. The vice-chancellor points out that there is no provision in the statute authorizing an allowance in cases to annul a marriage, and assumes that that impliedly shows that the Legislature did not intend that any such allowance should be made, and he says there is no precedent for it; that the woman can enlist some friend, assumably the father, in that case, to procure the contract to be annulled, and he closes the opinion as follows: "I can

Digitized by Google

find no authority, precedent or reason for compelling the husband to pay the expense of it, at least in this stage of the suit; and no sympathy, in this case, to stretch a doubtful authority, if there were any. The prayer of the petition is denied, with twelve dollars costs, to be paid by the next friend of the complainant."

But in 1845 the chancellor in North v. North, 1 Barb Ch. 241, held that where the husband brought the action to annul the marriage upon the ground that the wife had a former husband living, alimony and counsel fee were allowable, but the court remarked that where a wife files a bill in such a case, the allegations in her bill will be taken to be true as against herself when she applies for an allowance out of the husband's estate, evidently having in mind the Bartlett case.

In Griffin v. Griffin, 47 N. Y. 134, decided in 1872, the husband was defeated in an action brought by him to have the marriage annulled upon the ground that the wife had a former husband living, and the court held an allowance in the judgment for counsel fees, expenses, etc., was proper, finding the authority in the inherent powers of the court, as before referred to. Judge Rapallo refers to the statute as to allowances in divorce cases and says they are only allowed to the wife as plaintiff, and that it is very properly restricted to cases where the wife admits a valid marriage; that where she denies the existence of the marriage, she cannot consistently claim that the defendant is under obligation to furnish her with means to carry on her suit against him, citing Bartlett v. Bartlett and North v. North, *supra*. These suggestions were not pertinent to the decision, and the question was not in any manner before the court. And we have already seen that the Bartlett case, cited by him as authority, proceeded upon the theory that alimony could only be granted where authorized by statute, which has been held since not to be the law (Higgins v. Sharp, *supra*) and also held as a matter of discretion that no allowance should be made to the plaintiff, as the defendant was evidently acting in good faith, and the plaintiff was amply provided for. In fact the decision in Griffin v. Griffin is opposed to

Digitized by Google

the law laid down in Bartlett v. Bartlett, for it squarely holds that the court in allowing alimony is not confined to the cases mentioned in the statute, but acts from its inherent equitable powers.

In Meo v. Meo, 2 N. Y. Supp. 569, Judge O'Brien denies the wife's application for alimony, where she seeks to avoid the marriage on the ground of fraud, holding, *First:* That the case does not come within the provisions of the Code which grants alimony only in divorce cases, and

Second: That under the Revised Statutes a distinction was drawn between actions brought by the wife and those brought against her to set aside the marriage contract, citing North v. North and Griffin v. Griffin, and quoting the language of Judge Rapallo in the latter case hereinbefore referred to, and then says that the granting of such an allowance would be seemingly against the practice of the courts, citing Bloodgood v. Bloodgood, 59 How. Pr. 42, where Judge Daly, at a Special Term of the New York Common Pleas in 1880, followed Bartlett v. Bartlett, referring to Allen v. Allen as holding to the contrary, but says that it is against the cases in this State, and then Judge O'Brien refers in Meo v. Meo, to Allen v. Allen and Anonymous, 15 How. Pr., above cited, but says that considering that the Code makes no provision in these cases, taking the language of Griffin v. Griffin, and the fact that the Revised Statutes do not provide for such allowances, and that the weight of authorities in the State is seemingly the other way, he reluctantly denies the motion.

In Herron v. Herron, 28 Misc. Rep. 323, the wife sought to avoid the marriage on the ground of her not having arrived at the age of legal consent, Justice Dunwell denied her application for alimony, citing Meo v. Meo, and saying that a review of the cases in that case showed that the weight of authority was against the application. But there, undoubtedly, the motion would have been denied as a matter of discretion, for the fact that the wife found herself a party to a voidable marriage was her own fault.

In Hopper v. Hopper, 92 Hun, 415, where the husband brought the action on the ground that the wife had a former

Digitized by Google

spouse living, which fact was conceded, the only question in litigation being the good faith of the plaintiff in making the marriage, it was properly held that the relation of husband and wife did not exist and alimony was not allowed.

In Appleton v. Warner, 51 Barb. 270, the defendant wife was denied alimony because it was conceded by both her and her husband that the marriage was void because she had a former husband living.

The above cases are the particular decisions holding that alimony should not be granted in this class of cases, and it will be noted that they rest upon two foundations, (1) Bartlett v. Bartlett, which held that there was no authority to grant alimony in actions to annul a marriage, but the court had no sympathy with the plaintiff and would not exercise a doubtful authority if it existed, and (2) The case of Griffin v. Griffin, which necessarily overrules Bartlett v. Bartlett, as it does grant suit money in an action brought by the husband to dissolve the marriage with the wife. So that all these cases, for their authority, rest upon a case which has been overruled, and, in any event, rested solely in discretion, and the *obiter dictum* of Judge Rapallo in Griffin v. Griffin. This, in face of the fact that the English courts are directly to the contrary, and that we have practically adopted their practice in these respects.

It seems to me that Allen v. Allen and Anonymous, above cited, state the correct rule, and that the Court of Appeals in Higgins v. Sharp, 164 N. Y. 4, laying down the broad proposition, which is the English rule upon the subject which we are supposed to have adopted, "That actions to annul a marriage are governed with respect to alimony and counsel fees by the same principle as all other actions for divorce," has deprived the cases holding that there is no power in this class of cases of any authority they may have had before that time. It will be observed the Court of Appeals adopt, in substance, the expression of Davis, J., in Anonymous, above, and use an expression equally strong with that found in Shelford, *supra*. As a matter of principle the power ought to exist. The marriage is not void, but there is for all legal intents and purposes a legal marriage. Until set

Digitized by Google

aside the wife might maintain proceedings to compel the husband to support her; he could be arrested as a disorderly person for refusing to support her; she has the right to pledge his credit for her necessary support and maintenance; he has the right to her domestic services and to her earnings, except so far as the statutes relating to married women have created an exception; each would share in the estate of the other under the Statute of Distribution, and she surviving would have dower in his land, and in the law, to all intents and purposes, he stands as her husband and she his wife, and that relation cannot be changed until a decree of a court sets it aside. He could not defend in any proceedings brought against him as husband upon the theory that the marriage was void for the reason alleged, and neither could she so long as the marriage is not annulled. The plaintiff claims that the defendant knowingly and fraudulently contracted this marriage, with an intent not to get a wife, but simply a housekeeper, and that he had full knowledge of his condition before the marriage. She must go through life burdened with this marriage unless the court relieves her. If she has no money she is unable to prosecute the action. We, therefore, have the anomalous position — she is unable to prosecute the action to annul the marriage for want of means. The law will not compel the husband to furnish her means to prosecute it because she is not his wife; therefore, she must continue to be his wife. It is wrong to say, as some of the cases do, that the courts take her at her word, saying there is no marriage, because she begins the action by admitting that there was a marriage solemnized according to law, but claims that for certain reasons the marriage, as a matter of right and of justice to the public, ought not to stand. When she comes into court saying that a ceremonial marriage was performed, and seeks to avoid it on account of the husband's fraud upon her with reference to his capacity to enter into the contract, it seems a quibble of words to say that she comes into court admitting that there was no marriage, and, therefore, the court cannot, in that action, treat her in any respect as a wife. She comes into court as the wife, claiming to be such, but asks to be

Digitized by Google

relieved of the position on account of the defendant's fraud perpetrated upon her. In Starkweather v. Starkweather, 29 Hun, 488, the husband sought an absolute divorce upon the ground of the adultery of the wife with one Thomas F. Morford. The wife answered saying that she had obtained a divorce against the plaintiff, and after the divorce had married Morford and was now his wife. She applied for alimony and suit money, and the Special Term denied it upon the ground that she was denying the marriage relation, and, therefore, was not entitled to any rights as wife. The General Term reversed the holding, saying that the court had power to grant the motion, and that the motion rested in its sound discretion. In that case concededly, according to her theory, she was not the wife of the plaintiff; he was not obliged to support her or contribute at all to her necessities. In this case she is the wife, and the defendant is responsible for her support and maintenance, and if he has committed a fraud upon her by inducing her to enter into the marriage state when he could not make such a contract, it is a necessity for her to have the marriage set aside, and the necessary funds to prosecute the action are as much necessary for her as her clothing or maintenance, which he is clearly liable for until such marriage is set aside. It is a peculiar position that he can resist her motion to annul the marriage, as he does in this case, by denying the incapacity, and insist that she is his wife, and at the same time defeat her motion for alimony and counsel fees because she is not his wife. It is not necessary to say that the former cases cited proceed upon the sole theory of a want of power. They simply deny the motions because the practice is the other way. But this case contains things that none of the other cases contained. As we have seen, in the Bartlett case the discretion of the judge was influenced by the idea that the defendant believed he was capable of entering into the contract when he entered into it. The moving papers in this case show that the husband had previously married, that he knew his incapacity, and boldly admitted that he entered into the marriage for the sole purpose of getting a housekeeper and not a wife. So, as a matter of discretion, the

Digitized by Google

distinction here is so broad that counsel fees may well be allowed in this case, although denied in the other cases where there was a possibility of an innocent mistake. So that the granting of alimony in this case is not necessarily a refusal to follow the Special Term cases above referred to. But if they proceed upon a want of power, then it seems proper to refuse to follow them. Here the wife is seeking to get rid of the marriage relation. She, in effect, renounces in advance any claim that she has upon the defendant for her support and maintenance in the future, and if she succeeds in her action the marriage is at an end and her claim for support is at an end. It may not be unfair, considering that she has left her husband and seeks to go out into the world to support herself, to let that support begin now, and to deny as matter of discretion the application for alimony, but it is necessary for her to have funds to prosecute the action. She has no available resources sufficient to support herself and carry on this action. The expense will be quite large. A physical examination by two physicians has already been ordered. The husband having fraudulently induced her to enter into the marriage relation should furnish her the necessary funds to prosecute the case, so that if she has been defrauded by him she may have such relief as the law allows. An allowance is, therefore, made to the plaintiff of $300 for counsel fees and expenses to enable her to carry on and maintain the action. The court cannot decide this case upon affidavits. It cannot say she will not succeed. She makes a *prima facie* case sufficient to authorize this application to the court in her behalf. No costs of motion are allowed.

Ordered accordingly.

Digitized by Google

CHARLES R. WHIPPLE et al., Respondents, v. JENNIE WEBB, Appellant.

(Supreme Court, Saratoga Special Term, July, 1904.)

Husband and wife — When there is sufficient evidence that she was the undisclosed principal for whom he was acting.

Where a house is being constructed on a lot owned by a woman and her husband tells a materialman that the house is being built for sale and the husband orders materials to be furnished to it but does not say to whom they shall be charged and the woman sees the work in progress and directs alterations, there is sufficient proof of her being the undisclosed principal for whom the husband was acting to charge her for the value of the materials.

APPEAL from a judgment of a justice's court certified to this court.

James H. Bain, for appellant.

Charles F. King, for respondents.

KELLOGG, JOHN M., J. The appeal of Jennie Webb from the justice's court judgment is certified to this court. The evidence shows that upon two adjoining lots in the village of Glens Falls new houses were being erected. That Charles E. Webb, the husband of the appellant, inquired of plaintiffs the cost of putting in certain plumbing and fixtures. The price was given at eighty-one dollars for each house, and he told the plaintiffs to do the work, and it was done. The work for the corner house was paid for, and part of the work upon the other house. The judgment in this case represents the balance unpaid for the second house.

At the time of the negotiation with the plaintiffs Webb stated that he was building the houses to sell. Shortly after the work was done the appellant conveyed the second house, the title of which stood in her name. It does not appear who had the title to the lot upon which the first house was built. No direction was made to the plaintiffs as to whom the bill should be charged to, but they charged it to the appellant's husband.

Digitized by Google

Upon this appeal it is to be assumed that the justice found every fact and inference favorable to the plaintiffs which the evidence fairly justified. The plaintiffs had no information as to who was the owner of the property; neither of the defendants was sworn upon the trial. It does not appear that the appellant or her husband ever lived in this house, or that it was built for the purpose of a family residence. The justice had a right to find that it was being built for sale, and had the right to infer that it was being built by appellant for that purpose. The husband, not having directed the charge to be made to him, it is fair to assume that the parties understood the work was for the owner. The appellant knew the work was going on, was around the houses while the plumbing was being put in, and made some directions as to alterations in the plumbing in the house in question. The only purpose of the building of this house being to improve the property and for the purposes of sale, the fair presumption is that the work was done at the request of the appellant, and that she was the undisclosed principal for whom the husband was acting. Cutter v. Morris, 116 N. Y. 310; Boynton v. Squires, 85 Hun, 128.

This case differs materially from those relied upon by the appellant. In Zeigler v. Galvin, 45 Hun, 44, it was found as a fact that the husband contracted for the work, expected to pay for it, and that she did not expect or intend to pay for it, and was for improvements upon the family residence which it was clearly the duty of the husband to make.

Valentine v. Appelbee, 87 Hun, 1, was a question of pleading, and it does not appear for what purpose the house was being erected.

In Wilson v. Underhill, 83 Hun, 233, the husband carried on his farming business upon the wife's farm, he having the profits of it and paying the expenses. Plaintiff had dealt with him for twenty years. It was held that the wife was not liable for goods sold and charged to him.

In Snyder v. Sloane, 65 App. Div. 543, it does not appear that the wife owned the farm at all and there was an error in the exclusion of evidence.

In Jones v. Walker, 63 N. Y. 612, the repairs were upon

Digitized by Google

the house in which the husband and wife resided; he maintained the family; it did not appear that she had any other property or business, or that she assumed to pay any expenses in respect to the premises, and that the husband treated the property as his own in all respects, and did not claim to act for his wife, nor did she assume to be the principal, but everything was in his name as principal. The plaintiff knew all the facts, and charged the account to him and looked to him for payment. Clearly it was the husband's duty to house the wife, and there were no acts tending to show agency. The marital relation does not raise a presumption of agency. Neither does it repel it. The fact that a new house is being built upon a lot with the knowledge and consent of the owner, no facts being shown as to why or how it is being built, and the owner making some direction as to the work and afterward selling the completed structure, is some evidence that the work was done by her consent and at her request, and the materialman who enhanced the value of the wife's property under such circumstances, at the request of the husband, may properly be considered as doing it at the request of the owner. I cannot say that the judgment is entirely unsupported by the evidence. It is, therefore, affirmed, with costs.

Judgment affirmed, with costs.

RALPH THOMPSON, Plaintiff, *v.* ESMOND STILES, Defendant.

(Supreme Court, Saratoga Trial Term, July, 1904.)

Attorney — When a person is not one within Code Civ. Pro., § 73.

A person, who, although admitted to the bar in 1893, never filed with the clerk of the Court of Appeals the certificate required by L. 1899, ch. 225, or had a law office or practiced law except for about a year after his admission to the bar, cannot be deemed an attorney within Code Civ. Pro., § 73, prohibiting an attorney from buying a thing in action with the intent and purpose of bringing an action upon it, and therefore where the person buys a promissory note to bring an action on it — for a purpose which would be

Digitized by Google

lawful in the case of any individual — and gets another attorney to sue the note, the maker of it cannot defend under Code Civ. Pro., § 73.

ACTION upon a promissory note. Motions to set aside a verdict and for a new trial.

C. B. Andrus, for plaintiff.

J. L. Henning, for defendant.

KELLOGG, JOHN M., J. The jury by its verdict has found that the plaintiff was an attorney and counselor-at-law, and that he bought the promissory note in suit with the intent and for the purpose of bringing an action thereon. The finding that the note was bought for the purpose of bringing an action upon it is fairly sustained by the evidence. The conclusion that the plaintiff was an attorney-at-law within the meaning of section 73 of the Code of Civil Procedure is not fairly sustained by the evidence, and, therefore, the verdict in favor of the defendant is set aside and a new trial ordered, with costs to abide the event.

The plaintiff was duly admitted to the bar in the year 1893, and opened and maintained an office at Schenectady for about a year. Thereupon he discontinued his office and has since spent his time in traveling, or in residing at his country residence, and has not practiced since, and does not intend to practice his profession any more. He did not file the certificate required by chapter 165 of the Laws of 1898, as amended by chapter 225 of the Laws of 1899, and when this claim was bought by him for the purpose of obtaining title to some property that he desired, he put it in the hands of another attorney who brought this action thereon. Section 4 of chapter 225 of the Laws of 1899 makes it unlawful for a person to practice law, or hold himself out as an attorney, unless he has filed the certificate with the clerk of the Court of Appeals required by that statute. It thus seems that the plaintiff, by omitting to file the certificate, has put himself in a position where he could not either practice or hold himself out as a lawyer, and in fact no act is shown by

Digitized by Google

which he has claimed to be an attorney and counselor since he closed his office in Schenectady. The statute prohibiting the buying of claims by an attorney is one penal in its nature, and should be strictly construed, and with a fair intent to carry out the purposes and objects of the statute, which are the prevention of oppression by unnecessary litigation which would follow from the right of an attorney to purchase a claim for the sole purpose of enforcing it in the courts and making costs thereon. Beers v. Washbond, 86 App. Div. 582.

In Stringham v. Stewart, 8 Civ. Pro. 420, 423, and Evans v. Harris, 47 N. Y. Super. Ct. 366, it was held that the rule prohibiting an attorney from becoming a surety upon a bond was not violated by a person who had not practiced the profession for some years and who was engaged in other business, entering into such bond, although he had been an attorney. In other words he was not an attorney within the meaning of the rule. And it seems to me that the plaintiff, at the time he bought this claim, was not an attorney and counselor-at-law within the meaning of section 73, or within the objects which were fairly intended to be accomplished by that section.

It is claimed, however, that the jury disbelieved the plaintiff when he swore that he bought the claim as an investment and as a means of securing the house and lot belonging to the defendant, and that his purpose was to do whatever was necessary to accomplish the acquiring of the title to the property, using the note as a means, and that when the jury found, as it must have found, that he bought it with the intent and purpose of suing it, it had a right to treat him as intentionally swearing false in that respect, and, therefore, to disregard entirely his evidence as to his intention to quit the practice of the law. I do not think the verdict of the jury is capable of that construction. The plaintiff's evidence shows that he took the note the day, or the next day after, it was bought to an attorney and consulted with him as to the best means of obtaining the title to the property, using the note for that purpose, and immediately the attorney so consulted sent the note to the attorney who brought

Digitized by Google

the action upon it. The jury were fully justified, if they believed all the plaintiff said, drawing from it such reasonable inferences as practical men might draw in determining that he bought the note for the purpose and with the intent of bringing suit upon it. It was not necessary for them to disbelieve him, or to find that he had sworn false in that respect. The defendant owes this note. The plaintiff has done what any individual might do if he desired to force the defendants to sell the property. And as long as he was not a practicing attorney at the time, and was prohibited under the statute from practicing at the time, I hold that he was not an attorney and counselor within the prohibition of the statute. The verdict is, therefore, set aside as against the evidence.

Verdict set aside.

Matter of the Estate of ADELAIDE DAVID, Deceased.

(Surrogate's Court, New York County, July, 1904.)

Executor — Debt due his testator at his death — Punishment for disobedience of a decree.

It is the duty of an executor, indebted to his testator when he died, if solvent at any time before his final accounting, to pay, as an individual, the debt to himself as executor.

Where a decree has charged him with the debt his failure to comply with the decree is punishable with fine and imprisonment and these the surrogate may inflict.

APPLICATION to punish an executor for contempt.

J. Sabine Smith, for petitioner.

Dulon & Roe, for executor.

THOMAS, S. An executor is properly chargeable with any just debt which the testator had against him, and he is liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and amongst the next of kin, as part of the personal property

Digitized by Google

of the deceased (C. C. P., § 2714). This liability of the indebted executor is not for all purposes the same as if he had actually received so much money, and if he was at all times from and after the time when he qualified as executor insolvent and unable to pay the debt, he cannot be punished as for contempt for his refusal to pay and distribute such sum of money because of such insolvency (Baucus v. Stover, 89 N. Y. 1; Matter of Ockershausen, 59 Hun, 200; Joel v. Ritterman, 5 Redf. 136). In such a case, that is, where total insolvency existed during all of the time while he was an executor, no recovery can be had against his sureties for his failure to apply the amount of his debt as directed by the decree (Baucus v. Barr, 45 Hun, 582, aff'd 107 N. Y. 624). The principle of these decisions is that an executor is not required to be solvent, that it is sufficient if he shall be honest and diligent, and that the debt due from him to the estate of his testator is to be treated as an asset, the value of which is to be measured, like any similar asset, by its collectibility. Therefore, where it appeared that an executor was insolvent when appointed, but afterward became, and for a time continued to be, solvent, it was determined that he was properly chargeable with the amount of his debt to the testator as an asset in his hands to be distributed, and that his sureties were liable for his default (Keegan v. Smith, 60 App. Div. 168, aff'd 172 N. Y. 624). In the present case it was shown that the executor was, for years, and up to and after the time of his filing the account, solvent and fully able to pay the debt owing by him to the testatrix, and if it was not paid by him as an individual to himself as an executor, it was because he violated a plain duty. If the debt had been due from a solvent stranger, and he, with knowledge of the facts, had omitted to take any steps for its collection, and a loss had resulted, he would have been chargeable with its amount because of his violation of duty, on well-recognized principles. The question as to whether he should be charged with his debt as a worthless asset or at its full amount, was raised before the making of the decree upon his accounting, and was disposed of after full hearing and argument, and the decree thus made is, un-

Digitized by Google

til revoked, "conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay" (C. C. P., § 2552). The power of the surrogate to inflict a fine and punish the executor by imprisonment for a contempt for his disobedience of the decree is fully established (C. C. P., § 2555; Matter of Snyder, 34 Hun, 302, aff'd 103 N. Y. 178; Matter of Holmes, 79 App. Div. 267, aff'd 176 N. Y. 604).

The remedy was invoked and approved in a case where an executor transferred a specific legacy made to him, to the prejudice of creditors (Matter of Pye, 18 App. Div. 306, aff'd 154 N. Y. 773). It is true that the surrogate may, in a proper case, refuse to award this remedy (Matter of Battle, 5 Dem. 447), and that it should not be used for mere purposes of oppression, contrary to the spirit of our laws on the subject of imprisonment for debt, but I find nothing in the facts which would make leniency permissible. The entire procedure of the executor suggests a long continued and willful purpose to defraud his brother, and he has put at least a part of the property which should have been used to satisfy the claims upon him due to the estate of his mother into the hands of his wife.

The application to punish for contempt is granted.

Application granted.

Matter of the Application for the Proof and Probate of a Paper Alleged to be the Last Will and Testament of MARIA S. WESTBROOK, Deceased.

(Surrogate's Court, Seneca County, July, 1904.)

Will — Mutilation by cutting out a clause and pasting together the edges of the remaining parts — When it is not to be deemed a lost or destroyed or revoked will.

The fact, that after execution of a will its first subdivision was cut out and the edges of the remaining parts of the will fastened together by a piece of paper pasted on them and that the piece cut out cannot be found, is not a sufficient reason for denying the will

Digitized by Google

probate, as lost, destroyed or revoked, where it is shown on probate that the testatrix just before she died and six years after she executed the will, wrote a letter, put in evidence, to a person in which she said she had appointed him her executor some years before, that she has a box with her will and other papers in it, that the notes he finds in the box are to be given to a certain person named and that he may keep the box, and where, in addition, the scrivener and a subscribing witness to the will testifies to the substance of the missing clause.

PROCEEDINGS upon the probate of a will.

MacDonald Bros., for proponent.

Hawley & Carmer, for contestant.

C. F. Hammond, for Johnson Home, a legatee.

Geo. E. Zartman, for Betsy Pitman.

Ethel Cappy in person.

RICHARDSON, S. On the 17th day of September, 1903, Levi Van Buskirk presented his petition for the probate of an instrument purporting to be the last will and testament of Maria S. Westbrook, deceased; which instrument is dated July 10, 1889, and in which said Van Buskirk is named as sole executor; upon filing said petition a citation was issued and returned duly served and on the return day thereof Belinda Edwards the only heir-at-law and next of kin of said decedent, through her attorneys, Hawley & Carmer, filed an answer and alleged:

First. That the said paper is not the last will and testament of said decedent.

Second. That said paper was not subscribed and attested as and for her last will in conformity with the statute in such case made and provided.

Third. That said paper does not contain all of the clauses nor all of the provisions that it did contain at the time of its execution but that the same has been mutilated, changed

Digitized by Google

and in part removed and destroyed, and is not now the paper executed by decedent as her last will and testament, and

Fourth. That said paper is invalid and void in that the devise and bequest to the Johnson Home at Seneca Falls, N. Y., for Indigent Females is more than one-half of the property of the said decedent and that the paper propounded for probate herein is invalid as a last will and testament, and is illegal and void.

Thereupon an order was made directing that the legatees named in said will be cited, and they were duly notified.

From the inspection of said instrument it is evident that one subdivision of same has been cut out and the remaining part of said instrument brought together and held by a piece of paper having been pasted thereon.

The evidence in this matter shows that at the time of the execution of said instrument the testatrix was upward of twenty-one years of age, a citizen of the United States, competent to devise real estate and was not under any restraint or undue influence; it also shows that the same was executed as prescribed by law, and from such evidence we would not hesitate to admit said instrument to probate provided it was in all respects as when executed.

The contestant contends that this instrument, as it exists to-day, is a lost or destroyed will or that the taking away of the missing clause operates as a revocation of the entire will. In answer we refer to the evidence of Belinda Edwards in which she states that, on Wednesday, five days before the death of said testatrix, she stated to witness, "That there was a letter in the house for Mr. Levi Van Buskirk, her executor." This goes to show that testatrix did not consider this instrument a lost, destroyed or revoked will, and it is a well-established rule that a will cannot be revoked unless the testator in some way shows his or her intention so to do; again the evidence shows that after the death of testatrix said contestant searched for and found said letter, which she caused to be delivered to said executor, in which letter the testatrix says: "I made my will some years ago and appointed you executor, I have a small wooden box with my will and other papers in; all

Digitized by Google

the notes you find in it give to Belinda, the box if you care for it keep yourself." The evidence of contestant shows that she searched for and found the wooden box referred to in said letter and sent the same to the executor.

From these facts I must hold that this was not a lost, destroyed or revoked will and there remains but one question to be decided and that is what proof is necessary of the contents of the missing part of said instrument?

We have the evidence of Jasper N. Hammond, who was the scrivener of said instrument and one of the subscribing witnesses and who was asked this question: "Have you a recollection of what that missing clause was? Ans. My best recollection is that the clause read as follows: in substance, 'I will and give to Ethel Edwards adopted daughter of my daughter Belinda Edwards the sum of two hundred dollars.' And that comprises in substance the entire portion of the missing paragraph? Ans. Yes. Was that clause substantially as you have testified to contained and written in the will at the time of the execution? Ans. It was, I should have added that also the word 'second' was written upon the part of this sheet of paper which has been removed and over the waived line which precedes the line that reads as follows, 'I will and give the sum of two hundred dollars.'"

Mr. Hammond gives reasons for his recollection of the substance of the missing clause, and from his testimony alone we think there is sufficient proof of the missing portion of said last will.

Mr. Salisbury, the other subscribing witness, testified that said will was executed in Mr. Hammond's private room and after its execution the testatrix followed witness into the front office which he occupied, and stated to him her reason for making the provision for Ethel Edwards.

To this evidence the contestant objects, claiming that it is incompetent, improper and not admissible or proper for the purpose of supplying the missing clause or proving the contents of the will.

The Court of Appeals has held and the general rule is that when an act is done, to which it is necessary or important to ascribe a motive or cause, what was said by the actor at

Digitized by Google

the time, for which the motive or cause may be collected, is part of the act. And we cannot see why this evidence should not be admitted if we follow that rule.

Therefore, from the evidence we find, *first*: That Maria S. Westbrook duly executed her last will and testament July 10, 1899, that she was competent to execute the same and was not under any restraint.

Second. That after the execution of such will and after the delivery of same to her, the first subdivision of same was cut out and the remaining edges of such will were fastened together.

Third. That said will minus said missing clause was found in a box belonging to her, and

Fourth. That said missing clause or subdivision read as follows: "I will and give to Ethel Edwards adopted daughter of my daughter Belinda Edwards the sum of Two hundred dollars."

That said last will and testament when executed was in words and figures as follows:

"THE LAST WILL AND TESTAMENT OF MARIA S. WESTBROOK of the town of Tyre, County of Seneca and State of New York,

"I, Maria S. Westbrook aware of the uncertainty of life, do make, ordain, publish and declare this my last Will and Testament, in the manner and form following, that is to say:

"After the payment of my funeral charges, the expenses of administering my estate, and my lawful debts, I give, devise and bequeath my property as follows:

"*First,*— I will and give to Ethel Edwards adopted daughter of my daughter Belinda Edwards the sum of Two Hundred Dollars.

"*Second,*— I will and give the sum of two hundred dollars to the person who shall have the charge and care of me in my last sickness, and the judgment of my executor as to who shall be entitled to the same shall be final and binding on all concerned.

"*Third,*— I will, give and bequeath all the rest, residue and remainder of my property and estate of every kind,

Digitized by Google

absolutely to the 'Johnson Home at Seneca Falls, N. Y., for indigent females,' an incorporated Charitable Institution located at Seneca Falls, N. Y., and founded by the provisions of the will of Justus B. Johnson.

"*Fourth*,— I give my executor hereinafter named full power to sell and convey any and all real estate which I may own.

"Likewise, I make, constitute and appoint Levi Van Buskirk of Tyre, Seneca County, New York, to be executor of this my last Will and Testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name and affixed my seal the tenth day of July in the year of our Lord one thousand eight hundred and eighty-nine.

"MARIA S. WESTBROOK, [L. .S]

"The above written instrument was subscribed by the said Maria S. Westbrook in our presence, and acknowledged by her to each of us; and she at the same time declared the above instrument, so subscribed, to be her last will and testament; and we, at her request, have signed our names as witnesses thereto, in her presence, and in the presence of each other, and written opposite our names our respective places of residence.

"JASPER N. HAMMOND, Seneca Falls, N. Y.

"S. H. SALISBURY, Seneca Falls, N. Y."

And finally that said instrument is the last will and testament of Maria S. Westbrook; that the same was properly executed; that at the time of its execution she was of sound disposing mind and memory, and was under no restraint and I direct that the same be admitted to probate as a will of real and personal estate.

A decree may be, therefore, entered, admitting to probate the said instrument as her last will and testament.

Probate decreed.

Digitized by Google

GRIFFITH EVANS, as Executor, Etc., Respondent, *v.* THE UTICA AND MOHAWK VALLEY RAILWAY CO., Appellant.

(County Court, Oneida County, July, 1904.)

Railroad Law, § 32 — Liability thereunder of a street surface railroad for failing to maintain cattle guards at a road crossing in the country.

The provisions of section 32 of the Railroad Law, requiring every railroad corporation to maintain cattle guards at all road crossings sufficient to prevent cattle, etc., from going upon its railroad, apply to a street surface railroad company incorporated under section 1 of that act, and where the company fails to provide such guards at a road crossing it is liable, to the owner thereof, for the value of a cow which passed from a road to the tracks and was killed there by one of its cars.

APPEAL from a judgment recovered by plaintiff against defendant before J. P. Gubbins, a justice of the peace of the city of Rome, on the 26th day of August, 1903.

Kernan & Kernan, for appellant.

Lee & Senior, for respondent.

DUNMORE, J. This is an action for negligence. The defendant is a domestic railroad corporation and, at the time of the accident, was operating a line of surface suburban railway between the cities of Rome and Utica. About one and one-half miles west of the village of Oriskany the defendant's tracks cross a road forming what is known as "Kirley's crossing." At the time of the accident the defendant's road was fenced, but there were no cattle guards to prevent cattle from going upon the defendant's tracks. A cow belonging to plaintiff's testator went upon defendant's tracks and was killed. Plaintiff recovered a verdict in justice's court for fifty dollars. The only ground of negligence alleged is the failure of defendant to construct and maintain cattle guards as provided by section 32 of the Railroad Law. That section provides as follows: Every railroad corporation,

Digitized by Google

and any lessee or other person in possession of its road, shall, before the lines of its road are opened for use, and so soon as it has acquired the right of way for its roadway erect and thereafter maintain fences on the sides of its road of height and strength sufficient to prevent cattle, horses, sheep and hogs from going upon its road from the adjacent lands with farm crossings and openings with gates therein at such farm crossings whenever and wherever reasonably necessary for the use of the owners and occupants of the adjoining lands, and shall construct where not already done, and hereafter maintain, cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from going upon its railroad. So long as such fences are not made, or are not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines or cars to any domestic animals thereon.

"When made and in good repair, they shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section, but barbed wire shall not be used in its construction.

"No railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs from going upon its track from the adjoining lands."

Defendant contends that it is a street surface railroad and is governed by article 4, sections 90 to 110, of the Railroad Law, and that section 32 of that law does not apply to street surface railroads.

Concededly the defendant is not incorporated under sections 90 to 110, because none of those sections relate to that subject. Street railroads must be incorporated under article 1 of the Railroad Law. Hence street railroads cannot be organized and operated exclusively under article 4. If the general provisions of article 1 apply to street surface railroads, why should not the general provisions of article 2 of which section 32 forms a part also apply? The language of section 32 is broad enough to include both steam railroads and street railroads. The section begins: "Every railroad

Digitized by Google

corporation," etc. In sections 54 and 60, which are not intended to apply to street railroads, the words "steam railroad corporation" and "steam surface railroads" are used, while in article 4 which does not apply to steam railroads the expressions "street surface railroad" and "street railroad" are used.

It would seem, therefore, to have been the intention of the Legislature when it intended to include both classes of railroads to use the expression "Every railroad corporation," and, when it intended to include only one class, to mention that class specifically. My inference, therefore, is that if the Legislature had intended that section 32 of the Railroad Law should apply only to steam roads, it would have used the term "Every steam railroad corporation" instead of "Every railroad corporation" in framing that section. It has been frequently held that the object of that section is not merely to prevent loss to owners of horses and cattle, but also to protect passengers upon trains and cars from accident. The statute should, therefore, be liberally construed so as to effectuate the purpose of its framers and to afford the public adequate protection. Dolan v. N. D. & C. R. R. Co., 120 N. Y. 571.

It was conceded upon the trial that defendant's cars run from twenty-five to forty miles an hour where the accident occurred.

It would seem that passengers, traveling upon street cars, running at such a high rate of speed, would be in greater danger from accident resulting from a collision of a car with an animal upon the track than would passengers upon steam cars in like cases. I can, therefore, see no good reason why in construing the statute section 32 should not be held applicable to street surface railroads.

As that is the only question raised upon this appeal the judgment should be affirmed, with costs.

Judgment affirmed, with costs.

Digitized by Google

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* CHARLES M. BILLS, LUCIUS M. CUMBER and MICHAEL E. HANLIN, Defendants.

(County Court, Seneca County, July, 1904.)

Crimes — Indictment found on illegal and insufficient evidence set aside.

The provisions of the Code of Criminal Procedure, § 313, stating the reasons for which an indictment must be set aside, are not exclusive, and, in view of section 256 of said Code declaring that the grand jury can receive none but legal evidence, a county court may, by virtue of its inherent right and duty to protect the citizen in his constitutional prerogatives, set aside an indictment where it appears that it was found on illegal or insufficient evidence.

MOTION to set aside indictments.

William H. Hurley, district attorney (Hawley & Carmer, of counsel), for People.

Hammond & Hammond, for defendants.

RICHARDSON, J. This is a motion to set aside indictments against Charles M. Bills, Lucius M. Cumber and Michael Hanlin, found against them by the grand jury of the county of Seneca, on the 11th day of March, 1904; the indictments are under section 31 of chapter 112 of the Laws of 1896 and amendments thereto, being an act in relation to the traffic in liquors and the regulation of the same, etc.

The grounds of such motion are *first*, that the so-called indictments are not indictments in fact or in law because they are not based upon any legal evidence whatever.

Second. The said papers purporting to be indictments are not indictments in fact or in law, because they are based upon evidence that is insufficient, illegal and inadmissible for any purpose.

Third. That the said indictments are founded upon and are obtained in violation of section 256 of the Code of Crim-

Digitized by Google

inal Procedure, which provides that " The grand jury can receive none but legal evidence."

Fourth. At least three-fourths of the evidence taken in each case in the above-entitled matter was illegal and inadmissible evidence.

Fifth. Three-fourths of the evidence given in each of the above-entitled actions would tend to show facts pertinent to the commission of a crime by some one else similarly situated with the defendant.

Sixth. More than one-half of the evidence introduced before the grand jury in investigating the question as to whether the defendant had committed a crime tended to show that some other person than the defendant had committed a crime similar to that attempted to be charged against the defendant and as occurring on the same day as the one charged against the defendant.

Seventh. At least three-fourths of the evidence taken before the grand jury in each of the above cases would be sufficient ground for reversing the conviction of the defendant if the same were introduced in evidence on the trial of the defendant under the alleged indictment.

Eighth. Facts were proved by witnesses orally which could be established legally by documentary evidence only.

Ninth. The evidence taken before the grand jury discloses the fact that fundamental and essential rules of evidence were violated in the most flagrant manner on the investigation of the crime charged against the defendants.

Tenth. All the evidence in each case does not establish the commission of a crime by either of the defendants.

Section 256 of the Code of Criminal Procedure reads: " The grand jury can receive none but legal evidence."

I have read the minutes of the grand jury and they show that three persons on the 14th day of February, 1904, visited four places in the village of Seneca Falls in this county, for the purpose of securing, if possible, evidence against the proprietors of said places of the violation of the Excise Law, and such witnesses were examined in regard to all of said alleged violations at one and the same time, and the grand jury commenced their investigation by exam-

Digitized by Google

ining said witnesses as to sales made by one Salcman. In that case the minutes show that said Salcman did violate said Liquor Tax Law by selling on Sunday, to-wit, February 14, 1904; they were next examined as to pretended sales by said Cumber, Hanlin and Bills; as I have said, section 256 states that the grand jury can receive none but legal evidence; therefore, a person charged with a commission of a crime is assured that illegal evidence cannot be used in the presentment of his case to the grand jury, and if there is any so presented, he is entitled to judicial condemnation of such.

Counsel for the People oppose the motion, holding that the court has no power under section 313 of the Code of Criminal Procedure to set aside an indictment except for the reasons therein stated and cite in support of their contention People v. Rutherford, 47 App. Div. 209; that is a decision by Justice Kellogg in the Third Department, but we think that the decision of the Appellate Division of this Department, written by Justice Spring, and found in People v. Glen, 64 App. Div., at page 167, and affirmed by the Court of Appeals in 173 N. Y. 395, contains the law as it should be construed by us to-day. The Code of Criminal Procedure, section 312, provides that in answering an indictment, the defendant may either move the court to set the same aside, or may demur or plead thereto. Section 313 provides that an indictment must be set aside for either of the following two reasons, but in no other, viz.: When it is not found, indorsed and presented, as prescribed in sections 268 and 272; and, second, when a person has been permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in sections 262, 263 and 264; section 323 designates the grounds upon which the defendant may demur to an indictment, which are five in number, neither one of which, and neither of the causes for setting the indictment aside as stated in section 313, embrace the ground on which the defendants move to set indictment aside; and according to the doctrine advocated by the counsel they are deprived of all redress save appearing and being tried on an indictment that

Digitized by Google

was found, as they contend, upon insufficient as well as illegal evidence. If a jury, through spite and without evidence, find an indictment the defendant must go to jail and linger until he can be tried, if we follow the law as interpreted by the counsel. Justice Werner, writing the opinion in People v. Glen, 173 N. Y. 395, used these words in referring to said section 313: "But our courts have also always asserted and exercised the power to set aside indictments whenever it has been made to appear that they have been found without evidence, or upon illegal and incompetent testimony. This power is based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power which the legislature can neither curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional. * * * So far as said section 313 is intended to regulate only matters of procedure which involve no constitutional rights, it is valid and must be obeyed by the courts; but to the extent that it may destroy, curtail, affect or ignore the constitutional rights of a defendant, it has no force and is void."

From reading the evidence I am convinced the jury were influenced in the finding of the indictments against Bills and Cumber from evidence produced before them at the same time against said Salcman and Hanlin, as there was not sufficient legal evidence presented before said jury to warrant them in finding the indictments against said defendants Charles M. Bills and Lucius M. Cumber. Therefore, as to them, said motion is granted and the indictments against them are dismissed and set aside, but as to said Hanlin, the motion is denied.

Ordered accordingly.

Digitized by Google

THE TOWN OF FAYETTE, Respondent, *v.* ALBERT R. GREENLEAF, Appellant.

(County Court, Seneca County, July, 1904.)

Public Health Law (L. 1893, ch. 661, §§ 21, 25) — Power of a town board of health to suppress an alleged nuisance.

Unless it appears that there is a nuisance to be suppressed a town board of health can take no action concerning the matter under the Public Health Law (L. 1893, ch. 661, §§ 21, 25).

Where an owner of premises adjoining an unoccupied hotel in a town, tears up part of a private hotel drain running therefrom to the highway and into an open ditch and to the front of the owner's premises, the town board of health cannot collect of him a fine it imposed upon him for obstructing the drain against its rules and the expense of restoring it upon his neglect to do so after having been ordered to restore it, where no proof has been made before the board that the obstructed drain was a nuisance, where the owner of the adjoining premises has never been notified to appear before the board and answer any complaint in the matter, where he never has had any notice to appear before the board and show cause why he should not be ordered to remove the obstruction, and where the board has never examined the *locus in quo*.

APPEAL from a judgment recovered by the plaintiff against the defendant, November 12, 1903.

MacDonald Bros., for appellant.

Charles E. Opdyke, for respondent.

RICHARDSON, J. On the 12th day of November, 1903, the respondent recovered a judgment before Orlis Kuney, Esq., justice of the town of Waterloo, with a jury, against the appellant, Albert R. Greenleaf, for damages, twenty-five dollars, and costs, fourteen dollars and ninety cents, total, thirty-nine dollars and ninety cents. On the 30th day of November, 1903, the appellant filed with the justice a notice of appeal, together with an undertaking.

This action was commenced to recover a penalty fixed

Digitized by Google

by the board of health of the town of Fayette, as prescribed by section 21 of the Public Health Law, and expenses incurred by them, in all amounting to thirty-seven dollars.

The proofs presented to the justice and jury show that on the 30th day of June, 1902, L. M. Cumber and H. H. Jones presented to the town board of health of Fayette the following:

"*To the Town Board of Health of Fayette:*

"The petition of L. M. Cumber and Jones of Canoga in the town of Fayette, Respectfully requests said Board of Health to have sewer leading from their hotel in the village of Canoga which the said petitioners put down at an expense of $60–00 and which Albert R. Greenleaf had torn up a portion of said sewer or caused it to be done, laid by direction of Board of health and the consent of Commissioners of highway of said town.

"Dated the 30th day of June, 1902.

"[Ex. 2.] L. M. CUMBER,
H. H. JONES."

That upon the receipt of said notice the said board of health had served upon the defendant the following resolution:

"WHEREAS, as a complaint has been made to the Board of Health of the town of Fayette relative to the obstruction of a sewer leading from the Hotel in Canoga owned by L. M. Cumber and H. H. Jones.

"It is hereby resolved by said board of health that the obstruction to said sewer caused by Albert R. Greenleaf, or by his direction, be removed within five days by said Greenleaf, and that said drain be placed in same condition as before obstructed under penalty of the law in such cases made and provided. Moved and seconded that the health officer notify Mr. Greenleaf of the action of the Board."

And that thereafter and on or about the 21st day of July, 1902, there was served upon the defendant the following notice and command:

Digitized by Google

"*To Albert R. Greenleaf,*

"You are requested and commanded to appear before the Board of health of the town of Fayette on the 28, day of July 1902, at 10 o'clock A. M. of that day to show cause why you did not comply with a written order of said board of health, ordering you to put down and restore to its primal condition a certain sewer leading from Canoga Hotel and running in the highway and parallel about 14 feet with premises owned by you, which order was served on you by Dr Carleton, health officer of said board, on or about July 1st, 1902.

"BART CRONIN,
"*Chairman of Board of Health.*"

And that on the 28th day of July, 1902, a resolution, of which the following is a copy, was adopted:

"That in consequence of A. R. Greenleaf having refused to comply with an order of the Board of Health of the town of Fayette, resolved that said A. R. Greenleaf restore a certain sewer he had taken up.

"Now therefore it is hereby ordered and adjudged, that Dr William Carleton health officer of said town proceed to restore said sewer by employing help to do the same and at the expense of the said Greenleaf, and in addition thereto a fine of $25.00 imposed against said Greenleaf for obstructing said sewer thereby violating the rules and regulations of said Board of Health; said sewer runs westerly from the Canoga Hotel along the highway."

And by virtue of said several notices and resolutions, the plaintiff contends that it is entitled to the judgment as rendered before said justice and jury.

This appeal causes us to examine the Public Health Law (L. 1893, ch. 661) and ascertain as to whether the plaintiff has complied therewith, and if so, as to whether the defendant is liable for the damages as ascertained by the jury.

The board of health cannot act until it is shown that there is a nuisance to be suppressed or something to be done in the interest of public health.

Digitized by Google

The evidence shows that the so-called sewer was a private drain, constructed by the owners of the hotel, Cumber and Jones, the mouth of which was left open to discharge its contents, when anything was running through it, into an open ditch in front of appellant's premises. The notice of complaint presented to said board by Messrs. Cumber and Jones does not show that there is any nuisance or anything else detrimental to the public health about the premises complained of; there is no proof that the board of health ever examined the premises complained of to ascertain whether there was any nuisance or anything detrimental to public health; there is no proof from any source that there was a nuisance or anything detrimental to the public health in the taking up of the portion of said sewer, as stated in said notice. On the contrary, the proof is that the hotel was closed and nothing was running through the drain and that at about the time complained of in the complaint, appellant called the attention of respondent's health officer to the place in question, and that he declined to interfere because it did not constitute a nuisance.

Section 25 of the said Public Health Law prescribed, among other things, that "Every such local board shall receive and examine into all complaints made by any inhabitant concerning nuisances, or causes of danger or injury to life and health within the municipality, and may enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by its members or other persons designated for that purpose, inspect and examine the same. The owners, agents and occupants of any such premises shall permit such sanitary examinations to be made, and the board shall furnish such owners, agents and occupants with a written statement of the results and conclusions of any such examination."

There is no proof that the defendant was notified of any complaint having been made by Cumber and Jones to the board of health; he was never notified to appear and answer any complaint that they had made; the first he hears in relation to the matter is the order of July second, in which said board of health required him to remove within five

Digitized by Google

days the obstruction to said sewer; they did not give him notice to show cause why he should not remove such obstruction, but they commanded him to remove it; they did not show it was a nuisance and that it was anything detrimental to public health.

Said judgment having been rendered contrary to the law and evidence in the case, the same must be reversed, with costs, and it is hereby ordered that said judgment be reversed, with costs.

Judgment reversed, with costs.

LUDWIG LANTZ, Respondent, *v.* CALVIN GALPIN, Appellant.

(County Court, Steuben County, July, 1904.)

City of Hornellsville — Its justice's court is not an "inferior local court", as defined in the Constitution — Its jurisdiction.

Section 12, added to title six of the charter of the city of Hornellsville (L. 1888, ch. 40) by L. 1889, ch. 125, providing that its justices shall have the same jurisdiction as justices of the peace of the several towns of the State and where either or both of the parties reside in any of the towns of Steuben county adjoining the *town* of Hornellsville, is a valid enactment under section 18 of article VI of the State Constitution, as amended in 1869 — in force when the charter of Hornellsville was enacted — authorizing justices of the peace to be elected in the different cities of the State in such manner and with such powers and for such terms, respectively, as shall be provided by law.

Service of a summons on a defendant residing in a town adjoining the town of Hornellsville — out of which the city was erected — in that adjoining town, confers jurisdiction upon the justice of the peace of the justice's court of the said city therein residing who issued the summons.

The said justice's court is not an "inferior local court" within the meaning of section 18 of article VI of the State Constitution.

APPEAL by the defendant from a judgment rendered on the 24th day of February, 1904, in favor of the plaintiff, and against the defendant, for seventeen dollars and seventy-five cents, damages and costs.

Digitized by Google

J. B. Hargraves (Almon W. Burrell, of counsel), for appellant.

Whiteman & Hill, for respondent.

CLARK, J. The questions of fact in this case were correctly disposed of by the justice, and there were no errors in the reception and rejection of evidence which call for a reversal of the judgment, so the only question is as to whether or not the justice before whom this action was tried had jurisdiction to entertain it, the defendant being a resident of the town of Canisteo, and the summons having been served on him in that town, while the justice before whom the case was tried was a resident and officer of the city of Hornellsville.

Cases similar to this have frequently been before the courts, and it would seem by this time that the law on the precise point involved here should be well understood. In my opinion there is not the slighest doubt but that the justice had jurisdiction of this case, and that the charter of the city of Hornellsville under which the office of justice of the peace in that city was created involves no provision which is in violation of the Constitution of the State of New York.

Section 12 of title 6 of the amended charter of the city of Hornellsville provides as follows: "The justices of the peace of said city shall have and exercise all the powers, authority and jurisdiction, and discharge all the duties, and be entitled to the fees and compensation of justices of the peace of the several towns of this State, except as modified by this act. And all laws applicable to justices of the peace of the several towns, and to their official acts, duties, powers and liabilities shall apply to the justices of the peace of said city, and to their official duties and powers, excepting as modified by this act. Said justices shall also have jurisdiction in cases where either or both of the parties reside in any of the towns of Steuben county adjoining the *town* of Hornellsville." Laws of 1888, chap. 40, as amd. by Laws 1889, chap. 125.

The authority for enacting that legislation is section 17 of article VI of the Constitution of the State of New York, which is precisely like the judiciary article of the Constitu-

Digitized by Google

tion adopted in 1869, but which was there called section 18 of article VI, and which was in force when the charter of Hornellsville above quoted was adopted.

Section 17 of article VI of the Constitution provides that justices of the peace and district court justices may be elected in the different cities of this State in such manner, and with such powers and for such terms respectively, as are or should be prescribed by law.

Justices of the peace for cities are here provided for, and their courts are very different from the inferior local courts provided for in the very next section of article VI of the Constitution (§ 18).

The latter would be local courts, and their powers cannot be extended outside of the city, as is the case with the City Court of Auburn. Armstrong v. Kennedy, 23 Misc. Rep. 47.

For instance, if there was a City Court in Hornellsville, established under section 18 of article VI of the Constitution, it would be an inferior local court, and its civil jurisdiction would be limited to the city as is the case now with reference to the jurisdiction of the Recorder's Court.

It is clear that the Legislature intended to provide that the justices of the peace of the city of Hornellsville should have the same jurisdiction as justices of the peace in the several towns of Steuben county. This the Legislature in my opinion had the power to do. Const. N. Y., art. VI, § 17.

And a justice's court in Hornellsville is not an inferior local court, such as could be created by section 18 of article VI, it being evident that the Legislature, in providing for justices of the peace in Hornellsville, was acting under the authority of section 17 of article VI of the Constitution, which was numbered section 18 of article VI of the Constitution of 1869 in force when the amended charter of Hornellsville, above quoted, was passed.

If the justices' courts in the city of Hornellsville were merely inferior local courts, the people of that city, who had occasion to use justices' courts for the collection of small accounts and for the settlement of minor disputes, would be obliged to go outside of the city for a court of competent jurisdiction.

Digitized by Google

The Legislature could not have intended any such inconvenience to the people of the city, and a reference to the city charter is the sufficient answer to that proposition, for it distinctly states that: "The justices of the peace of said city shall have and exercise all the powers, authority and jurisdiction, and discharge all the duties, and be entitled to the fees and compensations of justices of the peace of the several towns of this State." And it further states that: "Said justices shall also have jurisdiction in cases where either or both of the parties reside in any of the towns of Steuben county adjoining the town of Hornellsville." Laws of 1884, chap. 149, as amd. by Laws of 1889, chap. 125.

That language is clear and easily understood. It was the intention of the Legislature to give to the people of Hornellsville justices' courts, with jurisdiction similar to that of justices' courts of the towns, and it had a clear right to do this under the Constitution. Art. VI, § 17.

Canisteo, where the defendant resided, and where the summons in this case was served, adjoined the *town* of Hornellsville, and out of which the city of Hornellsville was erected, and it seems reasonable to assert, that if the Legislature had intended that the jurisdiction of justices of the peace of the city of Hornellsville should be limited to cases where one or both of the parties resided in any town or towns of Steuben county adjoining the *city,* instead of the town, that language would have been adopted.

I have examined the numerous cases cited by the learned counsel for the appellant, but I cannot see that any of them can be considered an authority here, for the facts in each of the cases are not similar to the facts in the case at bar.

I am very clearly of the opinion that the case of Desmond v. Crane, 39 App. Div. 190, must be controlling here.

That the courts of justices of the peace of Hornellsville are not inferior local courts, but that the Legislature had power under the Constitution to provide for the justices of the peace in Hornellsville jurisdiction similar to that of justices of the peace of the towns, and that such was the intention of the Legislature in passing the amended charter of the city, above quoted.

Digitized by Google

The interesting cases of Armstrong v. Kennedy, 23 Misc. Rep. 47, and Shaeffer v. Steadman, 24 id. 267, are in line with the foregoing conclusions.

If I am correct in these views, it follows that the judgment appealed from must be affirmed.

Judgment affirmed, with costs.

JOHN F. CAHILL, Plaintiff, *v.* JOSEPH F. HOGAN, as Mayor of the City of Troy; JOHN T. NORTON, as Corporation Counsel of the City of Troy; WILLIAM H. GEARIN, as Comptroller of the City of Troy; PHILIP CASEY, as Commissioner of Public Works of the City of Troy, and THOMAS F. DOUGHERTY, as President of the Common Council of the City of Troy, together Assuming to Act as the Municipal Improvement Commission of the City of Troy, Defendants.

(Supreme Court, Albany Special Term, July, 1904.)

Local bill amendatory of a prior act — What matters constitute limitations of the extent to which the body of the amending act may amend the prior statute — The subject must be expressed in the title — When water bonds violate the Constitution, Art. VIII, § 10.

Where a local bill — the primary purpose of which as stated first in its title, is to amend a prior act relative to the government of a city, create a municipal improvement commission and define its duties and power — states, in the second and third portions of its title, matters germane to the said primary purpose, the amendment of the prior act, these matters constitute specifications of the particulars in which the prior act is proposed to be amended, and limit the extent to which the body of the amending act may amend the prior statute.

Where, in addition to the matters thus specifically set forth in the title of the amending act, its body contains a provision changing the personnel of the commission — a purpose nowhere set forth in the title of the amending act — so much of it as makes this change is void because it violates the constitutional requirement, article III, section 16, that the subject of a local bill must be expressed in its title.

Digitized by Google

Where the act authorizes the city to issue, for a proposed increased city water supply, bonds, running more than twenty years, which, taken with outstanding city and water bonds, will exceed ten per cent. of the assessed valuation of the city, and the act does not require the city to establish a sinking fund to redeem these water bonds at maturity, so much of the act as authorizes this issue is void as violative of section 10 of article VIII of the State Constitution.

MOTION for temporary injunction during the pendency of the above-entitled action.

This action has been commenced by a citizen and taxpayer of the city of Troy, asking that chapter 629 of the Laws of 1904 be declared to be unconstitutional and void, and asking an injunction restraining the so-called "Municipal Improvement Commission in the City of Troy" from doing a variety of acts specified in such complaint, and restraining and enjoining the mayor and corporation counsel of the city of Troy from acting as members of such municipal improvement commission.

Chapter 576 of the Laws of 1893, being an act entitled "An Act relative to the water works department of the city of Troy and to provide for an increased supply of water in the said city," provided a detailed plan for the construction and maintenance of water works in that city, and authorized the borrowing and expenditure of moneys to carry out the purposes of the act. By chapter 370 of the Laws of 1900, the former act was amended, and provided that the powers and duties theretofore conferred upon the water commissioners should thereafter be performed and discharged by the commissioner of public works of the city of Troy. Chapter 389 of the Laws of 1903, entitled "An Act in relation to the city of Troy, the government of said city, and to create a municipal improvements commission, and to define its powers and duties," provided as follows: "Section 1. There shall be a commission in the city of Troy, to be known as a municipal improvements commission, to be composed of the comptroller, president of the common council and commissioner of public works of said city." It gives such commissioners power and control over the construction and maintenance of the said water works, of the

Digitized by Google

parks and of the streets passing through or intersecting said parks, authorized them to perform all the duties and exercise the same powers that were theretofore given to and imposed upon the commissioner of public works of the city of Troy. It is also provided that they should have the power and duties devolved upon a board of commissioners for the selection and purchase of a site for a public driveway as provided by an act of the Legislature known as chapter 315 of the Laws of 1902, entitled "An Act to lay out, establish and regulate a public driveway in the city of Troy."

The act in question here, chapter 629 of the Laws of 1904, is entitled "An act to amend chapter three hundred and eighty-nine of the laws of nineteen hundred and three, entitled 'An act in relation to the city of Troy, the government of said city, and to create a municipal improvements commission, and to define its powers and duties,' and to enlarge the powers and duties of said commission and to provide for additions and improvements to Prospect park and to the water works of the city of Troy under the supervision of said commission and to authorize the issuing of bonds for such additions and improvements and to amend section twenty-four of chapter five hundred and seventy-six of the laws of eighteen hundred and ninety-three, entitled 'An act relative to the water works department of the city of Troy and to provide for an increased supply of water in the said city,' as amended by chapter three hundred and seventy of the laws of nineteen hundred, relative to the issue of bonds for the extension of the water works and an increased supply of water for the city of Troy."

The first section of this act amended section 1 of chapter 389 of the Laws of 1903, by adding the mayor and corporation counsel of the city to the municipal improvement commission.

James C. Fursman (Edgar L. Fursman, of counsel), for motion.

George C. Lecomte (John T. Norton, of counsel), in opposition to motion.

Digitized by Google

HERRICK, J. The statute in question is asserted by the plaintiff to be in violation of section 16 of article III of the State Constitution. That section reads as follows: "No private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."

It is unnecessary to discuss the question as to whether chapter 629, Laws of 1904, is a local bill; it will, I think, be conceded to be such. Does it embrace more than one subject, and is that subject sufficiently expressed in the title?

Its title may be divided into three parts, as follows: *First.* "An Act to amend chapter three hundred and eighty-nine of the laws of nineteen hundred and three, and entitled 'An Act in relation to the city of Troy, the government of said city, and to create a municipal improvements commission and to define its powers and duties." The second part is a specification of the manner in which the act is to be amended, and reads as follows: "and to enlarge the powers and duties of said commission and to provide for additions and improvements to Prospect park and to the water works of the city of Troy under the supervision of said commission and to authorize the issuing of bonds for such additions and improvements."

The third is a statement that still another act is to be amended, and is as follows: "And to amend section twenty-four of chapter five hundred and seventy-six of the laws of eighteen hundred and ninety-three, entitled 'An act relative to the water works department of the city of Troy and to provide for an increased supply of water in said city,' as amended by chapter three hundred and seventy of the laws of nineteen hundred, relative to the issue of bonds for the extension of the water works and an increased supply of water for the city of Troy."

If the matters set forth in the second and third parts of the title are germane to the principal matter, that is, an amendment to chapter 389, then they are specifications of the particulars in which it was proposed to amend that chapter; if they are not germane to such matter, but something in addition to amending the chapter named, then the

Digitized by Google

title embraces more than one subject, and the act would be void for that reason.

An examination of chapter 389 shows that the matters set forth in the second and third parts of the title as above set forth are germane to an amendment to such chapter, and it, therefore, seems clear to me that they are specifications of the particulars in which it was proposed it should be amended. By thus specifying the particulars in which it was proposed to amend the former statute, a limitation was placed upon the extent to which the body of the act of 1904 might amend such statute.

The several sections of the act provide for just those things specified in the second and third parts of the title of the act, as I have above divided such title, and no more, with the exception hereinafter referred to, that is to say, the act enlarges the powers and duties of the commission; it provides for additions and improvements to Prospect Park and to the water works of the city of Troy, under the supervision of said commission; it authorizes the issuing of bonds for such additions and improvements, and it amends section 24 of chapter 576 of the Laws of 1893, as amended by chapter 370 of the Laws of 1900.

But, in addition to the matters thus specifically set forth in the title of the act, the body of the act changes the composition of the municipal improvement commission, by adding thereto the mayor and corporation counsel.

Assuming, but not deciding, that the different matters referred to in the act under consideration are all embraced in one subject, to-wit: the government of the city of Troy; yet the provisions of the act were not sufficiently expressed in the title, because by expressing specifically in what respects it proposed to change and add to existing laws, the Legislature precluded itself from going further, and by such specification excluded the assumption that the body of the act would contain anything else.

This construction is sustained by the case of People ex rel. Corscadden v. Howe, 177 N. Y. 499. The statute under consideration there was chapter 127 of the Laws of 1902. It was entitled "An act to amend chapter two hundred and sixty-one of the laws of eighteen hundred and eighty-five, entitled 'An act in relation to the management of the Albany Peni-

Digitized by Google

tentiary, relative to the salary of the keeper of said penitentiary.'"

The body of the act amended section 4 of the original act of 1875 in several particulars. It provided that the salary of the superintendent should be fixed by the commission instead of being established at the rate of $3,000 a year. It also authorized the commissioners, whenever in their discretion it seemed to be for the best interests of the county of Albany, to dispense with the services of the superintendent and to place the penitentiary in the custody and care of the sheriff, and, if deemed advisable, to close and discontinue the same and sell the lands and buildings.

Assuming to act under the authority granted by this statute, the commissioners notified Mr. Corscadden, who was superintendent, that they would place the penitentiary in the hands of the sheriff of Albany county, and would remove the relator from his office as superintendent. Thereupon Mr. Corscadden brought an action to restrain the commissioners from removing him from his office and from transferring the penitentiary to the sheriff, alleging in his complaint, among other things, that the statute under which they claimed to act was unconstitutional in that it violated section 16 of article III of the Constitution, and, in passing upon that question, the court said: "The difficulty with the statute is not that it embraces more than one subject, but that that subject is not sufficiently expressed in the title. The whole matter of the regulation, custody and disposition of the penitentiary, the number and grades, the appointment, terms, tenure and salaries of its officers might properly constitute but a single statute. But the divisibility of subjects is very much akin to the divisibility of matter, and most subjects include things which may be treated as mere details of the greater subjects or as independent subjects in themselves. The object of the constitutional requirement was to 'advise the public in general and members of the legislature in particular by the title of the bill what interests are likely to be affected by its becoming law.' People ex rel. Burroughs v. Brinkerhoff, 68 N. Y. 259. Therefore, it is very apparent that the title of a bill may be so limited as to exclude provisions which unques-

Digitized by Google

tionably could fairly be enacted in a single statute with a more comprehensive title. In the title of the statute before us it is stated that the purport of the act is not merely to amend 'an act in relation to the management of the Albany penitentiary,' but to amend it only in one particular and on one subject, the salary of the keeper of the penitentiary. To our minds such a title not only fails to advise the public and the legislature that any other details of the penitentiary management than the salary of the keeper are affected by the bill, but is substantially a proclamation to the contrary. '* * * In the present case we think that the title of the bill, instead of apprising the public that it was intended to bestow powers upon the commissioners to discontinue the penitentiary or turn it over to the sheriff, tended to avert attention from the subject.'" See also Matter of City of Rochester v. Bloss, 77 App. Div. 28; affd. 173 N. Y. 646.

That, as a matter of fact, the legislators, and the people of Troy, in this particular case, had knowledge of that portion of the act which was not specified in the title, makes no difference in determining the sufficiency of the title. The question in these cases always is, was the title sufficient to give notice of the intended legislation, and that must always be determined solely by an inspection of the act itself, not by an investigation, any time the sufficiency of the title of a bill is in question, as to whether, as a matter of fact, the legislators and the people of the locality affected by it had knowledge of the contents of the bill.

I conclude, therefore, that that portion of chapter 629 of the Laws of 1904, making the mayor and corporation counsel of the city of Troy members of the municipal improvements commission of that city is void, the purpose to do so not being expressed in the title to the act.

The act is also challenged as being in violation of section 10 of article VIII of the Constitution. It is contended that the provisions of the act in relation to borrowing money and issuing bonds therefor are in violation of the portions of that section reading as follows: "No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebted-

Digitized by Google

ness, shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness. * * * Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the terms of the bonds issued to provide the supply of water shall not exceed twenty years and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. * * * Bonds issued to provide for the supply of water, * * * shall be included in ascertaining the power of the city to become otherwise indebted."

By section 7 of the act in question the city of Troy is authorized to borrow the sum of $150,000, and by section 10 it is authorized to issue bonds to secure the repayment of such money, payable in not less than five nor more than forty years. By section 15 the city of Troy is empowered to borrow the sum of $450,000 and to issue bonds therefor payable in not less than ten nor more than sixty years. By section 16 the city of Troy is authorized to borrow the sum of $1,700,000, and to issue bonds therefor, payable in not less than ten nor more than sixty years. No sinking fund is provided for redeeming such bonds. The bonds authorized to be issued by sections 15 and 16 are for moneys to be used in extending and increasing the water supply of the city of Troy, and the contention is that they are in violation of that provision of the section above cited which provides that such bonds shall not be issued for a longer period than twenty years, and that a sinking fund shall be provided for their redemption at maturity.

My own impression is that the twenty-year limitation in the Constitution applies to all bonds issued to provide a supply of water for a city, but that opinion is in apparent conflict with the opinion of the court in the case of Sweet v. City of Syracuse, 129 N. Y. 316.

Since that decision the Constitution has been amended, and whether the provision requiring the terms of such

Digitized by Google

bonds not to exceed twenty years applies to all water bonds, or not, it seems to me perfectly clear that it applies to a proposed issue of bonds that will, when added to the existing indebtedness, cause such indebtedness to exceed 10 per cent. of the assessed valuation of the real estate of the city or county. City of Rochester v. Quintard, 136 N. Y. 221–225.

As we have seen from the section of the Constitution above quoted, bonds already issued to provide for a supply of water must be included in ascertaining the power of the city to become otherwise indebted.

It appears that the bonded indebtedness of the city of Troy on the 31st of December, 1903, was $3,217,587.53, and that such indebtedness at the date of the hearing upon this matter was $3,084,316.03, and that the assessed valuation of the real estate in the city of Troy subject to taxation, as it appeared upon the assessment-rolls of the last assessment for State and county taxes prior to the passage of the act in question, was the sum of $50,989,946.

As before stated, this act authorizes the borrowing of money and the issuing of bonds in payment therefor to the aggregate amount of $2,300,000, which would increase the indebtedness of the city of Troy to more than 10 per cent. of the assessed valuation of its real estate. It is argued, however, that it is not compulsory upon the city of Troy to borrow and issue bonds for that amount of money. That it may borrow much less. That it is not compulsory to issue its bonds for more than twenty years. That the act permits it to issue the bonds for a less period of time. While that is true, still the fact is that the act authorizes the city of Troy to borrow $2,300,000, and to issue bonds therefor payable in more than twenty years.

The validity of a law is to be tested by what may by its authority be done. Stuart v. Palmer, 74 N. Y. 183; Gilman v. Tucker, 128 id. 190; Colon v. Lisk, 153 id. 188.

The validity of a statute must be determined by the nature, character and scope of the powers attempted to be conferred, although they may not have been actually exercised. People ex rel. Balcom v. Mosher, 163 N. Y. 32–42.

Neither can the different sections of the act authorizing the issuing of bonds be considered separately, and be held

Digitized by Google

valid severally, because the bonds authorized to be issued by each section would not increase the debt limit to more than 10 per cent.

Nor can one section be held valid and another invalid, because the issue of the bonds authorized by the one would not increase the debt above the permitted amount, while, if there was added to such issue of bonds the amount authorized by the other section or sections, the total amount would exceed the constitutional limit.

The authority to create the indebtedness must be considered as a whole, the different sections by which it is authorized read together as an entirety. The different sections must stand or fall together.

So read and considered, the several sections of the act authorizing the city of Troy to borrow money to the amount of $2,300,000, and to issue bonds therefor extending over a period of more than twenty years, and providing no sinking fund for their redemption, are for the reasons above stated repugnant to the Constitution and void.

The constitutionality of the act is challenged in other particulars, but, in view of the conclusions at which I have arrived upon the questions already considered, it seems to me unnecessary to discuss the other alleged defects in the act.

For the reasons above given, let an injunction issue pending the trial of the action, restraining the mayor and corporation counsel of the city of Troy from acting as members of the municipal improvement commission, and restraining said commission from borrowing money or issuing bonds pursuant to the provisions of chapter 629 of the Laws of 1904.

Ordered accordingly.

Digitized by Google

WALTER REID, Plaintiff, *v.* THE TOWN OF LONG LAKE, Defendant.

(Supreme Court, Fulton Trial Term, July, 1904.)

Lease — Considered recorded from time of delivery to clerk.

A lease, duly acknowledged and delivered for record to the proper county clerk, is, by virtue of L. 1896, ch. 547, § 266, to be considered recorded from the time of delivery, entitled thereafter to the protection of the Recording Act, and a *bona fide* purchaser, on a sale in foreclosure under a mortgage subsequently given by the owner of the fee to a third party for value, takes subject to the lease and is chargeable with knowledge of its existence, although the clerk never recorded it.

ACTION upon a lease.

James R. Van Ness (Henry F. Miller, of counsel), for plaintiff.

Andrew H. Cunningham (Andrew J. Nellis, of counsel), for defendant.

KELLOGG, JOHN M., J. The plaintiff seeks to have it determined that the defendant has no interest in the Sagamore hotel property at Long Lake. When the old hotel was burned, the town authorities contributed $12,000 in town bonds toward the rebuilding of the hotel, under the agreement that a certain room in the hotel should be used by the town perpetually as a town hall, and in the building of the hotel a suitable room in the basement was provided for that purpose and has since been used by the town. The agreement or lease between the owner and the town as to this town hall room was in writing and duly acknowledged, and was delivered by the supervisor of the town to the county clerk to be recorded. Before the completion of the hotel the owner became embarrassed, and it was necessary to raise an additional loan, and he agreed with one of the residents of the town to pay him $300 if he would obtain the necessary loan. By collusion between this party and the county clerk, the said lease and agreement was removed from the

Digitized by Google

county clerk's office, and the county clerk immediately certified that the title to the property was good and the loan was obtained upon mortgage, and the plaintiff derives title from the purchaser on the foreclosure sale under that mortgage. The plaintiff paid a full and fair consideration, and he had no actual notice of the lease and the rights of the town unless the fact of the election booths, the guard-rail and the large wooden tables being in this room, in which was no other property at that time, was such a possession by the town of the room as would imply notice to him and prevent his being a purchaser in good faith. The room had no connection with the other part of the hotel by doors or otherwise, and could only be entered from the outside. The same was also true of the barroom and café immediately adjoining it.

This lease or agreement was in law recorded when it was delivered to the county clerk for that purpose. Manhattan Co. v. Laimbeer, 108 N. Y. 578.

A neglect by him to perform his official duties, or his corruptly abstracting the paper from the files and records of the office, does not render it an unrecorded instrument. Real Prop. Law, Laws of 1896, chap. 547, § 266. It is true that after an instrument is recorded it is the record and not the original instrument which is notice to subsequent purchasers or incumbrancers, as was held in Frost v. Beekman, 1 Johns. Ch. 288, where a mortgage for $3,000, recorded as for $300, was held to be notice only of the $300 mortgage. The record in the county clerk's book is the record contemplated by the statute; but the provision cited makes the instrument itself, after delivery to the county clerk, notice in the same way as though it was written into or recorded in the books. After the instrument is recorded in the books, the record is notice to everybody, to the mortgagee or lessee the same as to others, and, therefore, the decision of Frost v. Beekman does not change the effect of the delivery of the instrument before record, before it is in fact recorded in the books, as is pointed out by Peckham, J., in Manhattan Co. v. Laimbeer, 108 N. Y. 591. It is sufficient for Frost v. Beekman to say that the instrument delivered to the clerk is in law a record and notice of just

Digitized by Google

what the instrument is until it is in fact written into and recorded in the books, and then the record itself and not the instrument furnishes the notice contemplated by the statute. That case and similar cases have no effect here, for this instrument was never written into the books, and the statute declares that it is deemed recorded from the time it is delivered to the clerk. So that clearly the instrument was recorded when delivered. No fraudulent or wrongful act of the clerk could take it from the record and cause it to be an unrecorded instrument. His mistake in recording might affect the rights of the lessee, but the record as made would be notice to the lessee as to others, and he cannot complain that he has not examined the record of his own conveyance. But here the only record is the paper itself left with the clerk, and its removal or destruction cannot render it an unrecorded instrument any more than would be the case if the county clerk's office were burned or a record-book stolen from the files. In the case of limited partnerships the statute is even more peremptory in terms that the partners must record both the certificate and affidavit, but the courts hold that a delivery to the clerk for record is a recording, and that the failure to record even for years does not render it an instrument not of record, as was held in the Laimbeer case above. The cases cited as to the effect of the erroneous or incorrect recording are not authorities upon this question, but the language of the statute seems to control the situation here. The town had done all that it was required to do to duly record this instrument. It is, therefore, entitled to all of the protection which the Recording Act affords to a recorded instrument, and the plaintiff purchased subject to the rights of the town and is chargeable with knowledge of the lease which the town had caused to be duly recorded.

The objection that the town had no power to contribute $12,000 toward building the hotel and accept this lease for it is answered by the fact that the town did it, and the recorded lease was notice of the fact, and the plaintiff cannot confiscate the defendant's property rights under the name of *ultra vires*. If the lease had not been recorded, and the defendant was relying solely upon the presence of

Digitized by Google

the guard-rail and booths and wooden tables as notice to the purchaser of its rights, then the fact that its claimed rights were such that it had not power to acquire might be material as bearing upon the question whether the plaintiff had notice of the defendant's rights. These things might not indicate to a reasonably prudent man that the town had such unexpected rights in the room; he might infer they were there by permission of the owner simply.

The plaintiff contends that there is no evidence to show who delivered this paper to the county clerk, or for what purpose it was there delivered, or that any fee was paid for recording it. It is probable that the paper being one which might legally be recorded, and being found at the clerk's office, the only place at which it could be recorded, that a fair inference arises that it was left there by or for the owner for the purpose of being recorded. But this is not left solely to inference. While the defendant was not at liberty to show the conversation between the county clerk and the party abstracting the paper for the purpose of establishing the purposes for which the paper was left with the county clerk, upon cross-examination the plaintiff drew out of the party who abstracted the paper that at the time he took it the county clerk told him that the paper had been left there by the supervisor to be recorded, but that he did not know in what book to record it and wished some one would take it away. After drawing out this evidence the plaintiff is not in a position to insist that there is no evidence in the case tending to show for what purpose the paper was left with the county clerk. The defendant is entitled to judgment for a dismissal of the complaint, with costs.

Judgment for defendant, dismissing complaint, with costs.

Digitized by Google

THE FIRST NATIONAL BANK OF FORT WAYNE, Plaintiff, v. HERBERT T. JENNINGS, Defendant.

(Supreme Court, Kings Special Term for Motions, July, 1904.)

Pleading — Allegations of complaint, when frivolous — Payment.

Where allegations of the complaint of the endorsee of promissory notes in an action brought upon them against the maker, that the payee endorsed and delivered them to the plaintiff and that the latter ever since has been and now is their owner and holder, are not denied by denials that the notes were "transferred or delivered by the lawful or other holder to the plaintiff" or that the the plaintiff "is the lawful owner or holder of said notes," are frivolous.

Payment is an affirmative defence which cannot be raised by a denial.

MOTION to strike out the answer as sham, and for "such further or other relief as may be just."

Louis F. Doyle for plaintiff.

Sanders & Gray for defendant.

GAYNOR, J.: The action is on two promissory notes against the maker. The complaint alleges that each note was endorsed by the payee (a corporation), "and by it delivered so endorsed for value to this plaintiff, which ever since has been and now is the owner and holder thereof." The answer is that the defendant denies that he has any knowledge or information sufficient to form a belief whether or not the notes were "transferred or delivered by the lawful or other holders to the plaintiff", and "whether or not the plaintiff is the lawful owner and holder of said notes." The verification is by one of the attorneys for defendant.

The answer is frivolous. There is no denial of the plain allegation that the payee endorsed the note and delivered it to the plaintiff for value. Instead, the denial is that the

Digitized by Google

note was transferred by "the lawful or other holders thereof to the plaintiff." The complaint does not allege that the note was transferred to it by "holders", or by the "lawful or other holders", but that it was endorsed and delivered by the payee. The answer is evidently a false device, and should be subjected to strict construction. The allegation of the complaint that the note was made and delivered to the payee is not denied. Hence it is undisputed that it was the lawful holder. The allegation of the complaint that the payee transferred the note to the plaintiff for value therefore shows that the lawful holder transferred to the plaintiff. The denial that "the lawful or other holders" transferred to the plaintiff is therefore nothing but a mere statement of a false conclusion of law on the undisputed facts. And the same is the case of the denial that the plaintiff is the lawful owner or holder. The undenied facts show that it is.

The denial in the second paragraph that the defendant "is indebted to the plaintiff in the amount set forth in the complaint" raises no issue. It is a mere statement of a false conclusion on the undenied facts, i. e., that the defendant made and delivered the notes and that they were transferred to the plaintiff by the payee. If they have been paid in whole or in part that has to be pleaded as a defence; a denial cannot raise that issue.

Judgment for the plaintiff on the answer as frivolous.

THE PEOPLE ex rel. GEORGE D. HAMMOND et al., Relators, v. MATTHEW P. BREEN et al., Defendants.

(Supreme Court, Kings Chambers, July, 1904.)

Inexcusable conduct of the police.

A descent upon rooms — where the accused were merely collecting by telegraph and telephone news as to the horse races — made by an inspector of police, a captain thereof, and twenty policemen, who arrested twenty-one employees of the place, took them to the police station and held them there over night and carried there all the electrical instruments, books and papers

Digitized by Google

in the place, is, where the police had not seen the prisoners do any criminal act and could not prove before the committing magistrate their commission of any such act, an inexcusable violation of the inherent and constitutional rights of liberty and property.

HEARING on a traverse to the return to writs of habeas corpus and certiorari.

Ira Leo Bamberger for relators.

Edward Sanford, Ass't. Dist. Att'y., for defendants.

GAYNOR, J.: Inspector of Police Schmittberger and Captain of Police Hodgkins, with twenty policemen, came into the place where these five relators were employed in Park Row, Manhattan, and arrested them and sixteen other employes, and took them all to a station house and locked them up. They tore all of the telegraph and telephone instruments out of the place, and carried them to the station house with all of the books and papers found in the place. The next morning the prisoners were brought before a magistrate, and he called upon the said police officials to make a complaint against them. They could make no complaint of any criminal offence whatever. They had seen the prisoners commit no criminal offence, and had no evidence whatever that they had committed any. In fact, there was no criminal offense. Nevertheless the magistrate unlawfully held the prisoners until next day. For this inadvertence on his part the prisoners' counsel seems to have been chiefly responsible. No legal complaint of any criminal offence has since been made against the prisoners, and the learned assistant district attorney who appears before me admits that there is no evidence that they committed any. The district attorney's office has in no way sanctioned the conduct of the police, but on the contrary has deprecated it.

The police acted without a warrant. Their acts were criminal lawlessness, pure and simple. They could have been lawfully resisted to the last extremity. They should be arrested and indicted for their acts. Where such police conduct prevails under a government of law, and not a despotism, law and order and free government are overthrown,

Digitized by Google

trampled upon and debased. Our government is one of laws and not of men, but such acts as these change it to one of men and unlawful force. In England the unlawful arrest of the humblest individual creates a public protest which the government has to heed for its own safety. There the educated and wealthy are the guardians and champions of the liberties of all.

The inspector of police was called upon to show his warrant when he invaded the place and was making the arrests and committing the other acts of criminal lawlessness; but his only response was that he was acting under the instructions of his superior. It is alarming enough that an inspector or a captain of police, or even an ordinary policeman, should commit such a crime against law and order, and that free government which it took generations to establish against arbitrary force under a claim of divine right; but that a police commissioner selected and kept in office by the mayor of this great free city should order it to be done, is wholly incredible. I do not credit it. If it were so, then free government here would be wholly overthrown.

But such superior orders would not shield those who committed the lawless acts. They could not confer any authority or give any immunity whatever. The police force is not a military but a civil force, and its powers are most carefully limited by our laws. A policeman cannot even be removed from his office for refusing to obey an order to commit a lawless act. On the contrary, it is the official who gives such an order who subjects himself to removal.

The police officials say for their justification that the employer of the prisoners was engaged in the collection and distribution by telegraph and telephone of what is called sporting news, viz., of horse races. But such a business is forbidden by no law. There is no pretence that the relators or their employers were in the business of betting. Do the police officials now assume to make laws? Despotism once suffered to get the least foothold grows rapidly; and almost before the community are aware of it, it reaches its complete stage of usurping the three separate government branches, executive, judicial and legislative, which is des-

Digitized by Google

potism, pure and simple. Little do people who make light of such things know what they are doing. And equally blind are those who say that it is all right for a good mayor or a good police official to go beyond the laws. Such so-called good officials are setting an example for their bad successors to follow. No official is good enough to be suffered to transcend or overthrow our system of government. Nor should it be lost sight of for a moment that acts of police lawlessness like those here disclosed are an effective means of extortion. This we all know from past experience. Our laws and procedure for dealing with all crimes are ample, and no official, high or low, is permitted to violate them. We have far more to fear from the growth of arbitrary power in officials than from all the other vices and crimes combined.

The following words recently uttered by an eminent lawyer and statesman may well be referred to in a judicial tribunal, viz.:

"There is one general characteristic of our system of government which is essential and which is the special duty of lawyers to guard with care — that is, the observance of the limitations of official power. The more frequently men who hold great power in office are permitted to override the limitations imposed by law upon their powers, the more difficult it becomes to question anything they do, and the people, each one weak in himself and unable to cope with powerful officers who regard any questioning of their acts as an affront, gradually lose the habit of holding such officers accountable, and ultimately practically surrender the right to hold them accountable."

In the recent case of *Farley*, the Appellate Division of the Supreme Court in the First Judicial Department said of an unlawful arrest which was trivial compared with the police lawlessness disclosed in the present case, as follows:

"The action of the police officer in making the arrest, and of the magistrate in holding the relator, deserve severe condemnation. Their acts appear to have been both illegal and arbitrary."

The relators are discharged.

Digitized by Google

Misc.] Court of General Sessions, New York County, July, 1904.

THE PEOPLE OF THE STATE OF NEW YORK *v.* THOMAS C. SMITH.

(Court of General Sessions of the Peace of the City of New York, at Chambers, Kings County, July, 1904.)

Crimes — When the admission of erroneous evidence is not fatal error.

The admission, upon the part of the People upon a trial for murder in the first degree, of clearly illegal evidence will not justify issue of a certificate of reasonable doubt whether a conviction of murder in the second degree should stand where on all the evidence the guilt of the accused is clear and during the trial and on the day after the illegal testimony was admitted by the trial judge he struck it out and instructed the jury to disregard it — it should be assumed that they did as instructed.

APPLICATION for a certificate of reasonable doubt on a conviction of murder in the second degree under an indictment for murder in the first degree.

Lorlys Elton Rogers for motion.

Edward Sanford opposed.

GAYNOR, J.: The defendant claimed that the pistol shot which killed the deceased was accidental. The learned trial judge admitted in evidence an oral statement of the deceased to a police officer that the defendant shot her intentionally, to which the defendant's counsel excepted. The said counsel afterwards moved to strike the evidence out. The motion was granted in part, and the next day on the coming in of the court the learned trial judge resumed consideration of the matter at his own instance, and granted the motion in respect of all the evidence, and instructed the jury to disregard it. Was the error cured? No one can tell how that will be finally decided by reading the decisions of our highest court. A strong tendency exists in our appeal courts to regard jurymen as below par in intelligence and judgment, and quite incapable of resisting prejudice, whereas the theory of our system of government and laws is to the very contrary, i. e.,

Digitized by Google

that they are better fitted to judge the facts, and less likely to be unduly influenced, especially in criminal prosecutions, than judges. The rule in this state that it must appear that the error "could by no possibility have prejudiced the defendant" (People v. Koerner, 154 N. Y. p. 376), seems to me to have been based on the assumption that a jury is intellectually unfit to try a case, and is giving way by degrees. For a bench of judges to complaisantly say, "Of course this error would not have affected us, but we cannot say that it did not possibly affect the jury," not only puts the jury below the learned judges in intelligence and common sense, but seems to put them below average intelligence and common sense, whereas the law rates them to the very contrary. It is also applying a rule of perfection to trials, whereas no such rule is applicable to any of the affairs of men.

The error in this case was a hard one on the defendant, but in view of all of the evidence, and of the clearness of the defendant's guilt, it does not seem to me that it may be reasonably said that the jury were affected by the evidence which was struck out. On the contrary, the assumption ought to be that they were not, but that they disregarded it as they were instructed to do (Gall v. Gall, 114 N. Y. p. 109; Holmes v. Moffat, 120 N. Y. 159; People v. Schooley, 149 N. Y. 99; People v. Doody, 34 Misc. Rep. 463).

Application denied.

FREDERICK L. McAFEE, Plaintiff, *v.* CLARENCE F. WYCKOFF, Defendant.

(Supreme Court, Kings Trial Term, July, 1904.)

Guaranty — "Payment on delivery."

A guaranty of payment by the vendee of the price of castings to be manufactured by the vendor "as per contract," deliverable in fifty lots on fifty consecutive days, is only a guaranty of the price of castings actually delivered, and, for a breach of the contract, consisting in the vendee's refusal to accept castings manufactured and shipped to him, the vendor cannot recover under the guaranty.

Digitized by Google

In view of the vendee's right to ascertain by inspection before acceptance whether the castings tendered correspond with those agreed to be manufactured, the covenant of "payment on delivery" is not violated by a stipulation, made between the parties to the contract after it and the guaranty had been executed, that the castings should be shipped to the vendee with the bill, that he should check them off, and then send a check for them to the vendee.

ACTION to recover against the defendant as guarantor.

Contract to manufacture and deliver 100,000 steel castings. Castings to be delivered at the average rate of 2,000 per day, payment to be made upon delivery of the castings. Defendant guaranteed payment on castings ordered as per contract.

After the making of the contract and the giving of the guarantee by the defendant, the vendor and vendee arranged between them that the vendor should ship the castings and send the bill thereof to the office of the vendee, and the vendee should check off the castings so shipped, and then send a check therefor to the vendor.

The vendor manufactured and shipped a considerable portion of the castings, a portion of which the vendee received and paid for, another part of which he received and did not pay for, and still another portion he refused to take from the railway station located at the place where it carried on business. The larger portion of the castings called for by the contract was not manufactured or delivery thereof tendered by the vendor.

The plaintiff seeks to recover from the defendant as guarantor payment for the castings received by the vendee and not paid for, also payment for the castings manufactured and shipped to the vendee, and which the vendee refused to accept, together with payment of the difference between the contract price of the castings not manufactured and what it would have cost to manufacture them.

The claim of the defense is that the guarantee was only of payment for castings actually delivered, and was not a guarantee that the vendee would take and pay for all the castings provided for in the contract. That it was only a guarantee of payment in accordance with the terms of the

Digitized by Google

contract, that is, cash on delivery. The defendant furthermore contends that by the arrangement, or agreement, between the vendor and the vendee, whereby the vendee was not to make payment for the castings until it had checked them off, there was a departure from the contract that he had guaranteed, and that he was thereby released therefrom.

Perkins & Jackson, for plaintiff.

Edward S. Griffing, for defendant.

HERRICK, J.: "A guarantor, like a surety, is bound only by the strict letter or precise terms of his contract and that the claim against him is *strictissimi juris.*" Creamer v. Mitchell, 162 N. Y. 477–486.

The contract in this case was for 100,000 castings to be delivered from time to time, at the average rate of 2,000 per day, to be paid for upon delivery. The guarantee was, "I guarantee payment on castings ordered by * * * as per their contract with you." This is not a guarantee that the contract will be fulfilled in all its terms. It is not a guarantee against any breach of the contract. It is simply a guarantee of payment in accordance with the terms of the contract, that is, that payment will be made for the castings delivered, upon their delivery. He only became responsible for the castings delivered and received by the vendee, or which were tendered and should have been received by the vendee, and not for any damages suffered by the vendor in consequence of the vendee's terminating the contract.

The plaintiff's claim to recover the difference between the contract price and the cost price of manufacturing the castings is a claim for damages for a breach of the contract, and is not a claim for payment for castings delivered.

I can see no distinction between this case and that of De Luka v. Goodwin, 142 N. Y. 194, and Beagle v. Cable, 55 App. Div. 155.

I must, therefore, hold that the plaintiff cannot recover upon the guarantee the difference between the contract price of the manufactured and untendered castings and what it would have cost to have manufactured them.

Digitized by Google

As to the contention, that there was a departure from the terms of payment provided for in the contract after the guarantee of payment by the defendant, by the arrangement between the vendor and vendee, by which when the castings were shipped, the vendor should send the bill therefor to the vendee, who should check off the castings and then send his check therefor, I do not think it can be sustained.

When payment for articles is to be made upon delivery, the delivery is not complete until the consignee has had an opportunity to ascertain what is tendered to him, and whether it corresponds with what he is asked to pay for. "When a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and deliver them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract." Pope v. Allis, 115 U. S. 363; Croninger v. Crocker, 62 N. Y. 151; Pierson v. Crooks, 115 id. 539; Benj. Sales, § 695.

It follows from this that a delivery is not complete until there has been a reasonable time for examination or inspection. This applies not only as to the quality of the goods, but also as to numbers when the delivery consists of a number of articles.

In this case the contract calls for the shipment from time to time of a number of the articles contracted for, and for payment for the number so delivered from time to time; the vendee had the right of inspection, or examination, to ascertain whether the number purporting to have been shipped and delivered was in fact delivered, and until a reasonable opportunity was afforded him for that purpose the delivery would not be complete.

In this case checking off meant ascertaining the number of castings, and until that number was ascertained it is apparent that the vendee would not know whether the amount set forth in the bill sent to him was correct or not.

No contention was made that payment by check was not a

Digitized by Google

compliance with the requirements of the contract. The plaintiff, therefore, is entitled to recover of the defendant the contract price of the castings manufactured and shipped to the vendee's place of business, as set forth in the decision filed herewith.

Judgment for plaintiff.

Matter of the Application of OTIS H. SMITH, an Elector and Taxpayer of the Town of Bath, Steuben County, for a Special Town Meeting under Section 16 of the Liquor Tax Law.

(Supreme Court, Monroe Special Term, July, 1904.)

Local option — Duty of town clerk to post printed notices — Adding fifth question — Soldier in a Soldiers' Home, when kept in an "asylum" — Does not lose his former residence — Grounds for resubmission.

A submission at a biennial town meeting of the local option questions is void where the town clerk fails to post in four public places in the town printed notices of the meeting, at the time and in the form and manner required by the Liquor Tax Law, but that law does not require him to exhibit at his office the sign and board-space below it, prescribed by the Town Law (L. 1890, ch. 569, § 86) or to post the notice on the board-space.

His adding, to the four printed statutory questions, a fifth printed question as to whether the town labor system of taxation for working its highways should be changed to a money system, is a circumstance favoring ordering a resubmission, as such a provision on the ballot may have tended to mislead and confuse the electors.

A soldier, kept in a Soldiers' Home maintained in the town by the State, is, within section 3 of article II of the State Constitution, a person kept in an "asylum", and, under that section, does not, when becoming an inmate of the Home for the sole purpose of enjoying its benefits, thereby gain or lose his former residence, it remaining his domicile for citizenship.

When the general election in the State and the biennial meeting of the town are held on the same day, he cannot, under section 12 of the Town Law, vote for town officers unless he could have voted at the general election, and where, although unregistered, he is permitted to vote on the local option questions, his illegal vote is a circumstance favoring ordering a resubmission, where his vote may have changed the result.

Digitized by Google

That eight-tenths of the taxpayers and business men of the town petition for a resubmission upon the ground that the result of the vote on the local option questions — confining the sale of liquor to pharmacists on a physician's prescription — has proved injurious to general prosperity and business in the town, is a further circumstance favoring ordering a resubmission.

APPLICATION by petitioner and others, asking that the four propositions under section 16 of the Liquor Tax Law be resubmitted to the electors of the town of Bath, Steuben county.

C. H. McMaster (John F. Little, of counsel), for C. H. Smith.

Reuben R. Lyon, for Moses Davison and the town clerk.

William G. Van Loon, for Patrick W. Cullinan, State Commissioner of Excise.

DAVY, J. This is an application by Otis H. Smith, of the town of Bath, Steuben county, supported by a petition of seventy-one electors, representing eight-tenths of the taxpayers and business men of that town, asking that the four propositions under section 16 of the Liquor Tax Law be resubmitted to the electors of said town, on the ground that the election held November 3, 1903, to vote on those questions was illegal. The petition states:

That at the last town meeting held in said town, the local option questions were voted upon, with the result that a majority vote was cast in the negative on the first, second and fourth propositions. The election is attacked on the ground that the notice printed and posted by the town clerk did not comply with the provisions of the Liquor Tax Law in that the notice does not state in and for what town the four excise questions would be submitted and that the printed notice included a different and distinct question for submission which had no relation whatever to the excise questions, to wit: "Question Five. Shall the labor system of taxation for the working the highways of the town of Bath be changed to the money system?" That the notice was not posted in four public places in said town.

It is further attacked on the ground that the town clerk

Digitized by Google

of the town of Bath had no bulletin board on the outer door of his office for the posting of notices as required by the Town Law, and that "no notice containing the four questions required to be submitted under the Liquor Tax Law was posted on any bulletin board on the outer door of said town clerk's office at any time prior to the holding of said biennial town meeting."

It is also alleged in the petition that if ballots containing the said four questions had been furnished the inmates of the Soldiers' Home in the town of Bath and they had been allowed to vote, the result would have been a decided majority in the affirmative on all four questions; that several soldiers from the Home offered to vote and for a time their votes were received, although not registered, and after several had voted a conference was held by the inspectors, who decided that the soldiers had the right to vote on the local option questions, but, as they were not registered, they refused to receive any more of their votes.

Section 16 of the Liquor Tax Law provides in reference to local option that: "In order to ascertain the will of the qualified electors of each town, the following questions shall be submitted at each biennial town meeting hereafter held in any town in this state, provided the electors of the town to the number of ten per centum of the votes cast at the next preceding general election shall request such submission by written petition, signed and acknowledged by such electors before a notary public or other officer authorized to take acknowledgments or administer oaths, which petition shall be filed not less than twenty days before such town meeting with the town clerk of the town;

"Question 1. Selling liquor to be drunk on the premises where sold.— Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under the provisions of subdivision one of section eleven of the liquor tax law, namely, by selling liquor to be drunk on the premises where sold, in (here insert the name of the town)?

"Question 2. Selling liquor not to be drunk on the premises where sold.— Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under the provisions of subdivision two of section eleven of the

Digitized by Google

liquor tax law, namely, by selling liquor as a pharmacist on a physician's prescription, in (here insert the name of the town)?

"Question 3. Selling liquor as a pharmacist on a physician's prescription.— Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under the provisions of subdivision three of section eleven of the liquor tax law, namely, by selling liquor as a pharmacist on a physician's prescription, in (here insert the name of the town)?

"Question 4. Selling liquor by hotel keepers only.— Shall any corporation, association, co-partnership or person be authorized to traffic in liquors under subdivision one of section eleven of the liquor tax law, but only in connection with the business of keeping a hotel in (here insert the name of the town)?"

Upon filing the petition the statute makes it imperative on the town clerk at least ten days before the holding of such town meeting or general election, to cause to be printed and posted in at least four public places in such town a notice of the fact that all of the said four option questions will be voted on at such town meeting or general election and the said notice shall also be published at least five days before the vote is to be taken, once in one newspaper published in the county where such town is situated, which shall be a newspaper published in the town, if there be one.

The statute also provides that: "If for any reason except the failure to file any petition therefor, the four propositions provided to be submitted to the electors of a town shall not have been properly submitted at such biennial town meeting, such propositions shall be submitted at a special town meeting duly called. But a special town meeting shall only be called upon filing with the town clerk the petition aforesaid and an order of the supreme or county court, or a justice or judge thereof, respectively, which may be granted upon eight days' notice to the state commissioner of excise, sufficient reason being shown therefor."

It is evident that this statute contemplates that the four excise propositions shall be resubmitted to the electors of the

Digitized by Google

town at a special town meeting, if, for any reason except the filing of the petition therefor, the four propositions were not properly submitted at such biennial town meeting, providing the requisite number of electors petition therefor. This provision of the statute, while it is mandatory, should receive a reasonable construction. A resubmission of these propositions should not be ordered for slight irregularities, but when they affect the result of the election or render it uncertain, then the propositions should be resubmitted.

The statute does not say that such propositions may be submitted. It says that they shall be submitted. It is a familiar rule of construction that where persons are interested in the giving of a notice, as all the electors of a town are, as to whether there shall be a license or no license, where the statute says it shall be submitted, the word "shall" is mandatory.

To hold that this statute is directory only would leave it discretionary with the town clerk not to comply with the requirements of the statute in printing and posting the notices. Such a construction would be contrary to the plain intent of the act. If the notice is not posted in public places many of the voters might be ignorant that the local option question is to be voted on and thereby a large number of the electors might be deprived of the right to vote on a matter of the gravest importance to their interests. The object of publishing and posting the notice is to give every citizen having a legal right to vote an opportunity to exercise that privilege.

If errors and irregularities are to be held valid, the public are not protected in their rights and the will of the people upon the question of license or no license would in many cases be defeated. The Local Option Law, like the law pertaining to the election of officers, is designed to secure a fair expression of the electors of the town in favor of or against granting license. These provisions of the statute which affect the time and object of the election are mandatory, because they lie at the foundation of the election.

In Matter of Eggleston, 51 App. Div. 38, the Local Option Law was very carefully considered and passed upon by the

Digitized by Google

Appellate Division of this Department. In that case the town of Drayton in the county of Cattaraugus held its town meeting on the day of the general election. A petition for the submission of the question of license or no license was filed first with the town clerk and then taken from that office and filed with the clerk of the county. No notices were given by the town clerk for the submission of the question. The court held that the votes were a nullity, saying the filing of the petition with the town clerk was a necessity and the ten days' notice by that official obligatory.

In Matter of O'Hara, 63 App. Div. 514, Mr. Justice Williams in speaking for the court said: "Upon the merits we think we are controlled by the case recently decided in this court (Matter of Eggleston, 51 App. Div. 38). We determined in that case that the notice must be given as required by the Liquor Tax Law in order to render the election valid, and we must adhere to that rule here."

In People ex rel. Caffrey v. Mosso, 30 Misc. Rep. 164, one of the questions submitted did not follow the language of the statute. It was held that this was mandatory and the vote upon the question of no effect.

In McMullen v. Berean, 29 Misc. Rep. 443, the petition was filed with the town clerk but not with the county clerk, the town meeting being held at the time of the general election within the prescribed time. The court held that its requirements were mandatory, remarking that when the law clearly points out the way in which proceedings must be taken by those desiring the will of the electors of the town, the plain provision of the law must be complied with.

In People ex rel. Hovey v. Town Clerk, 26 Misc. Rep. 220, the petition was not filed with the town clerk twenty days before the town meeting and the court held that he could not be required to print the ballots.

The court, in Matter of Powers, 34 Misc. Rep. 636, held that the provision of the statute that at least ten days before the holding of the town meeting the town clerk shall cause notices to be printed and posted is peremptory, an absolute requirement necessary to give jurisdiction to take the effect prescribed by the statute. The court says: "It is not a

Digitized by Google

question of actual but of legal notice. It is analogous to the notice required for a judicial sale where both posting and publication are required. Neither can be omitted."

It is urged that the casting of illegal votes by the inmates of the Soldiers' Home is an irregularity sufficient of itself to authorize the court to resubmit the excise questions to the electors of the town at a special town meeting. It frequently happens in this class of cases that the irregularities are such that it is difficult to determine to what extent they have affected the result. But where it is plain that they change or render doubtful the result, then it is the duty of the court to resubmit such questions to the voters of the town.

I do not agree with the learned counsel for the petitioner that inmates of the Soldiers' Home had a right to vote on the local option questions even if they had been registered. The Constitution of this State, article II, section 3, provides that: "no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almhouse, or other asylum, or institution wholly or partly supported at public expense."

The Soldiers' Home is included in the term "asylum" used in the above clause of the Constitution. It is immaterial whether it is called an asylum or a soldiers' home. An asylum is defined by Webster to be an institution for the protection or relief of the unfortunate. Soldiers who enter the Home and are supported at the public expense are objects of charity, having no home or means of support, and are maintained at the public expense. The object and purpose of the Soldiers' Home at Bath is to provide a home for the reception, care, maintenance and relief of soldiers and sailors who served in the Union army or navy during the War of the Rebellion from the State of New York, and those honorably discharged therefrom, who, from any cause, stand in need of the care and benefit of a home. The inmates of the Home own no property, pay no local taxes, do no work in or for the

Digitized by Google

benefit of the town and have no pecuniary interest in its local affairs. The Home which they occupy is State property and they are under the control and management of the board of trustees appointed by the Governor. It is evident that the Constitution prohibits a change of residence under such circumstances and that when a person enters the Soldiers' Home for the sole purpose of receiving the benefits of the institution, his former residence must be considered his domicile for citizenship.

In Silvey v. Lindsay, 107 N. Y. 56, the inmate had been in the Soldiers' Home for six years and swore that it was his intent at all times to make his residence in said institution so long as he should be permitted to do so. The court held that he could not gain a residence by being an inmate of the institution and was not an elector in the township where the Home was located. If the inmate was a resident of the town of Bath, where the Home is located, at the time of his admission, his right to vote, if registered, could not be questioned. The Constitution prohibits a change of residence under such circumstances. When one becomes an inmate of the Home for the sole purpose of receiving the benefits conferred, his former residence must be considered his domicile for citizenship.

Section 16 of the Liquor Tax Law provides that: "Any elector qualified to vote for town, county or state officers at such town meeting or general election shall be entitled to vote on such local option questions."

Section 12 of the Town Law provides that, at town meetings held at the time of general elections, no person shall be allowed to vote for candidates for town offices who is not registered and entitled to vote at such general election.

The qualifications, therefore, necessary to be had by the inmates of the Soldiers' Home to vote on the local option questions are the same as the qualifications necessary to vote for candidates for town offices. It is conceded that the inmates of the Soldiers' Home who voted were not registered. Those votes were clearly illegal. If, however, the result was not changed by their votes, the fact that they were re-

Digitized by Google

ceived would not make the election void and might not be sufficient reason in and of itself for calling a special town meeting.

It is conceded that the notice included "Question Five," which reads: "Shall the labor system of taxation for the working the highways of the town of Bath be changed to the money system?"

It is urged that the publication of this question with the four questions submitted under the Liquor Tax Law tended to confuse and mislead the voters and thereby rendered the election nugatory. It is quite apparent that the printing of this notice did not conform to the requirements of the statute, and may have confused and misled the electors.

It is also urged by the petitioner that it was the duty of the town clerk under the Town Law to have kept a signboard with the name of the town thereon followed by the words "Town Clerk's Office" and to have posted the notice thereon.

The Town Law (L. 1890, ch. 569, § 86) contains this provision: "There shall also in like manner be furnished and kept for every town clerk's office a sign with the name of the town followed by the words, 'town clerk's office' in plain characters thereon, with sufficient board space immediately below for posting thereon the legal notices of the town, which sign and board-space shall be placed and kept on or at the outside front door of every town clerk's office, which board shall always be one of the public places upon which any legal notice in the town may be posted."

It appears that the town clerk's office is located and has been in recent years in a second-story room in a building near the center of the west block on Main street or Liberty street (which is the main street) of the village of Bath. There is a door at the foot of the stairway leading to said office and a notice posted there would be certain to attract the attention of persons passing along the street.

The Liquor Tax Law does not require the town clerk to post the notice upon the sign or board which the Town Law requires him to keep in front of his office, on which legal notices may be posted. He is required to print and post in

Digitized by Google

at least four public places in such town a notice of the fact that all the local option questions provided by the Liquor Tax Law will be voted for at such town meeting or general election. It would have been advisable, however, for the town clerk to have had such a board and to have posted the notice thereon, but he was not required under the statute to do so.

It is also alleged in the petition and not disputed that the village of Bath is a commercial center and the county seat of the county of Steuben, where one-half of the courts are held. It contains the county buildings and records and the board of supervisors holds its sessions there; the Steuben County Fair is held annually for a week and people come there from all parts of the State and from other States to transact business, and that it is necessary that hotel accommodations should be furnished to transient guests at all hours of the day or the night; that the hotels in the village cannot be maintained and accommodations furnished to the guests unless they are permitted to sell liquors; that the vote against granting license has already greatly affected the business interests of the town; taxes have been increased, electric-light day service discontinued, rents diminished and property depreciated in value; that for thirty years past the town of Bath with one single exception of about six months, has been a licensed town; that the citizens of the town naturally reached the conclusion that "Question Four," pertaining to the sale of liquor by hotel-keepers would be carried and for that reason no special effort was made to induce the electors to vote for it; that eight-tenths of the business men and taxpayers of this town have petitioned to have the excise questions resubmitted. Taking all those facts into consideration with the fact that all the alleged irregularities combined evidently affected the result, a refusal, under such circumstances to order a resubmission of the excise questions might result in great injury to the business men, taxpayers and electors of the town.

The prayer of the petitioner is, therefore, granted and the town clerk of the town of Bath is directed to call a special

Digitized by Google

town meeting, at which the four excise questions shall be resubmitted to the electors, who, untrammeled by any other issues, may fully and fairly express their views at the ballot-box, provided, however, that the electors of the town to the number of ten per centum of the votes cast at the next preceding general election shall within fifteen days from the date of filing this decision request such submission by a written petition signed and acknowledged by such electors and filed with the town clerk, as required by section 16 of the Liquor Tax Law.

Ordered accordingly.

THE CITY OF ROCHESTER, Plaintiff, *v.* RALEIGH FARRAR, Defendant.

(Supreme Court, Monroe Special Term, July, 1904.)

City assessment roll — Failure to describe at all when not cured — County Treasurer's deed.

Where a description of ten city lots, as contained in the city assessment roll, does not describe any property belonging to a person assessed thereon and therefor, the assessors have no jurisdiction to lay the assessment; and where, after confirmation, the city sells for non-payment of taxes, and buys in, it acquires thereby no tax lien enforcible against the owner or his grantee.

The assessment being void, a subsequently passed local statute, validating prior city taxes notwithstanding any omission or error in the proceedings, etc., or in the assessment as made, cannot cure the defect.

A county treasurer's deed — resulting from a failure to pay county taxes and a foreclosure had on that lien — when containing a description of the ten lots different from that in the roll, passes no title to the purchaser and the owner of the land is not estopped from showing that deed to be void.

ACTION to foreclose a tax lien.

William A. Sutherland, for plaintiff.

Quincy Van Voorhis, for defendant Farrar.

Digitized by Google

DAVY, J. This action is brought to foreclose a tax lien. The principal question in dispute is whether the strip of land assessed is sufficiently described on the assessment-roll to identify and indicate that it is the defendant Farrar's property. He contends that the land which was intended to be assessed to Selye, his grantor, was not described on the assessment-roll; therefore, this action cannot be maintained.

It is conceded that the following is an exact copy of the assessment as it appears upon the assessment-roll each year:

"Name of person assessed..... De V. W. Selye.
"Lot No.....1, 2, 3, 4, 5, 6, 7, 8, 9, 10.
"What Tract or Subdivision..Lake View Park Tract.
"What part of lot.....S. Pts.
"Width front.....33.
"Width rear.....33.
"Depth.....1331.
"Name of street.....blank."

The Lake View Park tract contains about sixty acres and is bounded east by Lake avenue, on the west by Dewey avenue and on the south by a line parallel with and fifty feet north from the north line of Driving Park avenue. Pierpont avenue runs north and south through the tract.

The assessment-roll calls for a strip of land 33 feet front and rear off of a tier of ten lots of the aggregate width of 1,331 feet. It appears from the evidence that there are no ten lots in the south part of the tract with an aggregate width of more than 500 feet. In fact that are no ten lots in the tract that answer the description in the assessment-roll.

It is urged by the learned counsel for the plaintiff that a map of this tract was made in 1850 which shows a strip 33 feet wide extending along the south side of the tract with ten large lots numbered from one to ten flanking it on the north side and that the assessment was made with reference to those lots upon that map. It will be seen by that map that Farrar's property is no part of the ten lots nor the south part of any ten lots in Lake View Park tract.

Digitized by Google

The map of 1850 was superseded by the map of 1884, which cuts up the ten lots into ninety-two lots besides a street. In making up the assessment it must be presumed that the assessors made it with reference to the map of 1884, because they have said nothing about any other map, and the city charter, section 261, requires them to make it from the last adopted map unless otherwise stated. The assessors doubtless intended to assess Farrar's land, but they have in fact assessed land which he does not own; it belonged to other parties and was illegally and improperly assessed to him.

The levying of a tax upon land and the enforcement of the levy are proceedings *in rem* against the land and not *in personum* against the owner. In respect to the collection of taxes assessed against real property an accurate description and location of the land assessed is essential to the validity of the assessment and without certainty in that respect no foundation is laid to foreclose a tax lien. Tallman v. White, 2 N. Y. 66; Zink v. McManus, 121 id. 265; Sharp v. Johnson, 4 Hill, 92.

The assessment is notice to the owner of the burden cast upon his lands and limits the title of the purchaser at the tax sale to the land described upon the assessment-roll.

It has been repeatedly held that all proceedings for the purpose of taxation must be substantially, if not strictly, complied with. Whatever the Legislature has specifically directed in this respect the courts cannot disregard and hold as immaterial. May v. Traphagen, 139 N. Y. 478; Merritt v. Village of Portchester, 71 id. 309; Stebbins v. Kay, 123 id. 31; Colman v. Shattuck, 62 id. 361; Matter of N. Y. C. & H. R. R. R. Co., 70 id. 191; People v. Hagadorn, 36 Hun, 610; Dever v. Hagerty, 43 App. Div. 354; Oakley v. Healey, 38 Hun, 244; Underhill v. Keirns, 54 App. Div. 214. This statutory rule cannot be disregarded without encouraging laxity in the discharge of official duty and endangering the rights of the taxpayer.

Cooley in his work on Taxation (vol. 1, 3d ed., p. 740), says: "In listing the land it must be described with particu-

Digitized by Google

larity sufficient to afford the owner the means of identification, and not to mislead him. * * * The purposes in describing the land are: first, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid, may be notified what land is to be offered for sale for the non-payment; and third, that the purchaser may be enabled to obtain a sufficient conveyance. * * * The evidence of identity is the record which contains the description * * * that where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of payment cannot be performed and the assessment is void."

It was remarked by Judge O'Brien in Sanders v. Downs, 141 N. Y. 424, that: "It is essential to the validity of every assessment for the purposes of taxation that the statute, under the authority of which it is made, is complied with in every substantial particular. The only warrant for the imposition of a tax or burden upon the citizen or his property without his consent, must be found in some positive law, and it cannot be enforced unless imposed in the manner pointed out by the statute."

In Colman v. Shattuck, *supra*, Judge Miller said: "The intention of the statute was that the assessment should contain a true designation or description of the land, so that the purchasers at the sale might be able to find and locate the same, and that the owner might know that his land was advertised." An accurate description, therefore, of the land assessed is essential to the validity of the assessment and without certainty in that respect no foundation is laid for bringing an action to enforce the collection of the tax."

It is urged by the learned counsel for the plaintiff that the defect in the description of the property was cured by section 1, chapter 522 of the Laws of 1903, which provides that: "All taxes heretofore spread upon the assessment rolls of the various wards in the city of Rochester are hereby validated, and rendered legal and binding upon the persons taxed and property assessed, notwithstanding any irregularity, omis-

Digitized by Google

sion or error in any of the proceedings relating to the same, or in the making, levying and assessment of the same, and all proceedings for the collection of such taxes are hereby declared valid and effectual, notwithstanding any irregularity, omission or error in any of such proceedings, and notwithstanding the omission from any tax warrant of the seal of the city of Rochester."

While this act cures irregularities and omissions in all proceedings for the collection of taxes in the city of Rochester, it does not cure defects in the proceedings where the assessment is void for want of jurisdiction.

If the assessors failed to comply with the requirements of the statute in describing the property, so that it could not be located and that no title to the property could pass to the purchaser at the tax sale, the Legislature could not validate and give life and effect to a void assessment. The Legislature has provided in the charter of the city of Rochester that in case of error in the description of lands the common council may correct such irregularities and cause the amount of tax imposed to be reassessed on the property. But in this case the common council did not correct the imperfect description in the assessment-roll of the land in question and order a reassessment, but treated it as having been sufficiently described. The act comes clearly within the rule laid down by the Court of Appeals in Cromwell v. MacLean, 123 N. Y. 489, where Judge Peckham in discussing the question of a tax sale said: "Holding, as we must, that no title or interest in fact passed to the purchaser at these tax sales, and that the original owner, therefore, still retained his title, the effect of the act in question, if valid, is by legislative fiat to transfer the title of the property of Edward C. Wilson, as trustee, to the lessees under these invalid leases for a hundred or a thousand years, as the case may be. Has the legislature of this state the right to take the property of A and transfer it to B under the guise of confirming sales made of such land *in invitum,* but by which no title, in fact or in law, passed from the owner to the purchaser? The statement of the question should be its best

Digitized by Google

answer. Property thus taken is not taken by due process of law."

It may be asked what difference does it make to say that the Legislature is acting only in a way of validating proceedings to collect a tax, which, in justice, the owner of the land ought to pay? The answer is that the proceedings have been so fatally defective that no title has passed and the owner has title to his property the same as if no proceedings had been taken. Where is the authority in such case for the Legislature itself to transfer the title of his property to some one else?

It was held in Cromwell v. MacLean, *supra*, that: "The legislature undoubtedly has large powers in the way of curing certain defects in proceedings to tax the citizen. * * * If the thing omitted and which constitutes the defect be of such a nature that the legislature might by prior statute have dispensed with, or if something had been done, or done in a particular way which the legislature might have made immaterial, the omission or irregular act may be cured by a subsequent statute." But where the assessment is void for want of jurisdiction there is no power on the part of the Legislature to convey the title of a man's property from him to another by the mere exercise of legislative enactment.

It is also urged that on account of nonpayment of the county taxes a foreclosure was had which resulted in a deed to the purchaser dated January 3, 1901, which cut off all other claims excepting that of the city of Rochester. By that judgment it appears that the land was described as being the south part of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 in said tract; then in addition it gives the boundaries as being 33 feet on Lake avenue; running thence south 1,331 feet along the south tier of lot 35 of the 2,000-acre tract, being the south line of Lake Avenue Park tract on the west, 33 feet in length by the north and south street, now called Pierpont avenue, and width by a line drawn from Pierpont avenue to Lake avenue parallel with the above-mentioned south boundary line and 33 feet northerly therefrom. This description does not correspond with the description given in

Digitized by Google

the assessment-roll and the county treasurer could not convey by foreclosure sale any different piece of property. The foreclosure could not cure the defect by substituting a new and different description of the land. The deed, therefore, conveyed no title to the land in question.

A sale made when no title passes cannot be valid so as to transfer the title by foreclosure proceedings and the owner of the land is not estopped from shewing that the deed is invalid and conveys no title.

In case of a void judgment the owner of the land is not bound to appeal, but may resist it and assert its invalidity at all times. This is a fundamental right, in the absence of jurisdiction, for the reason that a judgment or other adjudication is a nullity. Chase v. Chase, 95 N. Y. 381.

It is urged that Selye, Farrar's grantor, was not misled by the assessment, but he knew that the tax was upon his property. There is no proof in the case establishing that contention; but we will assume that Selye examined the tax-roll to ascertain whether the strip of land in question, which he then owned, had been assessed. It is evident that he could not have found any assessment which described his property. He had a right, therefore, to repudiate the claim of the city on the ground that his land had not been taxed.

It was said by Judge O'Brien in Sanders v. Downs, *supra,* that: "Any construction of the statute which would in any degree encourage erroneous, lax or careless methods of making up the assessment-roll, would disturb the security with which the law guards private rights, and at the same time prove detrimental to public interests."

I am, therefore, of the opinion that no part of Farrar's land in question was described in the assessment-roll and the assessment, therefore, was void. It is also equally clear that the return of the nonpayment of taxes so levied conferred no authority upon the plaintiff to maintain this action.

The complaint, therefore, must be dismissed with costs to the defendant Farrar.

Complaint dismissed, with costs to defendant Farrar.

Digitized by Google

JOHN R. PLATT, Plaintiff, *v.* HANNAH ELIAS et al., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Action to follow and impress a trust on a fund alleged to have been acquired by the crime of extortion — When a receiver and an injunction pendente lite are proper.

Where the complaint and affidavit of the plaintiff, a man over eighty years of age, read on his motion, for an injunction and a receiver, made in an action brought against the defendant, Elias, a woman, as well as against various depositaries of her moneys, to follow and impress a trust on $685,385, he paid her in unequal annual payments from 1896 to 1904, alleges that he made these payments because of her threats that, unless he did so, she would do him bodily harm, expose his admitted illicit relations with her to his family and friends, charge him as father of her illegitimate child, and tell her husband, a man of violent temper, of the illicit relations, and further, that she did, in effect, charge him as such father by causing to be filed with the registrar of vital statistics, of the city where both these parties lived, a certificate stating, as its father, a person having the same Christian and surname as those of the plaintiff, and, that when some of the payments were made to her by him, her lawyer was in a room nearby, the plaintiff — the defendant Elias not having yet answered — must be deemed to have sufficiently raised, by a fair preponderance of evidence, the question whether Elias has not been guilty of the crime of extortion and obtained these moneys thereby.

The appointment *pendente lite* of a receiver of her property, and her restraint from interference with it or disposal of it, and restraining her depositaries from paying her deposits in their hands to her or any one else, are therefore proper, but she is, *pendente lite*, entitled to an allowance sufficient for her comfortable support, to free use of the premises and household furniture, and to her necessary wearing apparel absolutely.

ACTION in equity. Motion for an order appointing a receiver of the property of defendant Elias, and for an injunction pending the action restraining her from in any

Digitized by Google

manner interfering with or disposing of any of her real and personal property and restraining the defendant banks and trust companies from paying to her or to any one on her behalf any money on deposit with any of them to her credit.

Warren, Warren & O'Beirne, for plaintiff.

Washington Brauns, for defendant Elias.

BLANCHARD, J. The plaintiff's cause of action is based upon his claim that during the period between January 1, 1896, and May 25, 1904, the defendant Hannah Elias wrongfully obtained from him the sum of $635,385, as follows: In 1896, $19,075; in 1897, $39,230; in 1898, $62,000; in 1899, $51,900; in 1900, $84,265; in 1901, $87,076; in 1902, $124,206; in 1903, $186,409; in 1904, $31,533. And he brings this action in equity to secure the following relief: "*First.* That an account be taken by and under the direction of this court of the said moneys so unlawfully and wrongfully obtained and converted by the defendant Hannah Elias, the property of this plaintiff, and now held by her, or by any of the other defendants in her name, or for her account or benefit, and an account of any profits arising therefrom. *Second.* That the said real properties, as well as personal properties and bank accounts and deposits so held by the defendants, or any of them, in the name of or for the benefit of the defendant Hannah Elias, be impressed with a trust in favor of the plaintiff, and that the said defendants be declared to hold the same as trustees for the plaintiff, and that the defendants and each of them be required to transfer and pay over the same, and any accumulations, rents, profits, interest, income or interest thereof to this plaintiff. *Third.* That the defendants and each of them be perpetually enjoined from interfering with, transferring or disposing of said real estate, or with the personal property and money so deposited with or held by them, and from asserting any right or claim thereto save in this action, and that an injunc-

Digitized by Google

tion issue accordingly pending this action. *Fourth.* That pending this action a receiver be appointed to receive, collect and hold all rents derived from said real estate described during the pendency of this action, and to abide the direction of the court. *Fifth.* For such other and further judgment or relief as may be just and proper in the premises, together with the costs of this action." This motion is for an order appointing a receiver of the property of the defendant Elias, and for an injunction, pending the action, restraining her from in any manner interfering with or disposing of any of her real and personal property, and restraining the defendant banks and trust companies from paying to her or to any one on her behalf any money on deposit with any of them to her credit. The material facts alleged by the plaintiff in his complaint and affidavit submitted on this motion are substantially as follows: At some time prior to January 1, 1896 (the precise date not being stated), the plaintiff had illicit sexual intercourse with the defendant Hannah Elias. Thereafter, in the year 1902, she gave birth to an illegitimate child and caused a certificate of its birth to be filed in the bureau of vital statistics, in the county of New York, falsely stating that John Platt, the plaintiff, was its father. Between January 1, 1896, to May 25, 1904, the plaintiff has paid to the defendant Elias sums of money at various times, aggregating the sum of $685,385. He alleges he paid these sums to her because she threatened that unless he did so she would do him bodily injury and would expose his illicit relations with her to her husband and to the plaintiff's family, friends and acquaintances, and would charge him with being the father of her illegitimate child and thereby bring him into public scandal, disrepute and disgrace, and also threatened that her husband, who was a man of violent temper, would do him bodily harm if made aware of their illicit relations. The plaintiff further alleges that, being in great fear of bodily harm, and to procure said defendant's silence and to prevent her from exposing his relations with her and thereby bringing him into public scandal and disgrace and injuring the plaintiff in his good name, fame and

Digitized by Google

reputation among his family, friends and acquaintances, and without any consideration whatever, he delivered and handed over to her, from time to time, and in various sums, the said aggregate sum of $685,385. He further alleges that with this money she has purchased the real and personal property now owned by her, and that the balance is deposited to her credit in the defendant banks and trust companies. Such, briefly stated, are the alleged facts upon which the plaintiff bases his cause of action. The defendant Elias, not having yet interposed her answer, it is not possible to state exactly the nature of the defense which she may interpose. But in her answering affidavit on this motion she denies being guilty of any wrongdoing in respect to the receipt by her of money from the plaintiff, and states that she has known him for seventeen or eighteen years, and that during that period the plaintiff has given her divers sums of money, the amount of which she is not able to state, and that such sums of money as were given to her by the plaintiff were given voluntarily and without threats of any kind made by her. She also states that since she first met the plaintiff he has been continuously visiting and consorting with her. When divested of all immaterial and merely sensational features the alleged facts of this case present an ordinary cause of action in equity to impress a trust upon property acquired with funds wrongfully and fraudulently obtained. It is not an action in which the plaintiff seeks to recover from his mistress, or a common prostitute, the money which he has voluntarily paid to her in return for favors. The plaintiff has not brought this action upon that theory at all, and, therefore, I fail to see the relevancy of the discussion in the brief submitted by the plaintiff's counsel, contending that this money may be recovered, or a trust created in respect thereto, on the theory that its payment was in the nature of a gift secured through undue influence exercised over the plaintiff by the defendant Elias. The plaintiff does not claim that he made her any gift of the money in question, or that she acquired it through undue influence over him. He claims that he was the victim of extortion and blackmail,

Digitized by Google

and it is upon that theory of the case that this motion should be discussed. I do not think that the immoral relations existing between the parties have anything to do with the essential qualities of the plaintiff's cause of action. If this woman acquired her property with the money which she has extorted from the plaintiff by threats, as claimed by him, he is entitled to have that property and its proceeds and profits turned over to him, and that, too, without reference to whether she was or was not his paramour. On the contrary, if he paid her any of this money in good faith and voluntarily in return for any favors which she may have extended to him, I think it would be an amazing proposition to ask any court to entertain any action brought by him to secure the return of the money so paid, or of its proceeds or profits. There may be cases where, because of mental incapacity on the part of the man and undue influence on the part of his paramour, a gift of the former to her could be set aside and the amount thereof recovered. But that is the general rule of law applicable to all gifts made under such circumstances in which undue influence is proved to have been the cause of the gift. It is not necessary to invoke any unusual or novel rule of law to sustain such an action. But in the case at bar we have the claim, pure and simple, that the money was extorted from the plaintiff by the defendant Elias, and it seems to me immaterial whether the plaintiff was weak or strong in body and mind, or whether he was young or old. If he paid this money because of the defendant's threats to expose him and because of his fear that she would carry out this threat if he did not meet her demands for money, he is entitled to the relief he seeks. If the defendant Elias acquired the plaintiff's money in the manner complained of by him, she acquired it feloniously, and money so acquired and the proceeds and profits thereof may be followed by the real owner and recovered and a court of equity will impose a trust thereon in his favor. Newton v. Porter, 69 N. Y. 133; New York & Brooklyn Ferry Co. v. Moore, 18 Abb. N. C. 108; affd., 102 N. Y. 667; Brown v. Brown, 40 Hun, 418; Bassett v. Spofford, 45 N. Y. 387. In so deciding I have

Digitized by Google

given due consideration to the denials and other matter contained in the answering affidavit of the defendant Elias, but she does not deny that the plaintiff has, within the space of eight years and five months, paid her the sum of $685,385. The payment of so large a sum, under the circumstances, is an amazing fact and calls for explanation. There is no proof that during this period the plaintiff's illicit relations with her continued. He does not allege it and she merely states that since she first met the plaintiff he has been continuously visiting and consorting with her. It is, therefore, not apparent why the plaintiff paid over this large sum of money to her. It does appear, however, that in 1900, when the plaintiff was upward of eighty-one years of age, she caused to be filed in the bureau of vital statistics a certificate stating that "John Platt" was the father of her child. It also appears that when the plaintiff made some of the payments the defendant Elias consulted some one who was in an adjoining or nearby room. If these payments were voluntary why was the presence or nearness of her lawyer necessary? Upon an application of the character embraced within the scope of this motion it is the duty of the court to weigh the proof offered by the respective parties, and in so doing to consider the facts and circumstances and thus seek to ascertain the probable truth. This I have done, and my conclusion is that the plaintiff has, by a fair preponderance of proof, shown his right to the relief he asks pending the action. In connection with this I have given careful consideration to the testimony given by the plaintiff before the magistrate upon the examination before him in respect to the criminal charge of extortion brought against the defendant Elias upon the complaint of the plaintiff. The testimony related particularly to only one item of the money claimed to have been extorted, namely, the item of $7,500 paid to her by the plaintiff in May, 1904. I am satisfied that, although this testimony may not have been sufficient standing alone to establish the fact that the defendant Elias had committed the crime of extortion, it would be sufficient in this action, when offered with other proof, to require the submission of

Digitized by Google

the issues to the court or jury for determination. The plaintiff would not be bound in this action to establish his cause of action under the somewhat limited and strict rules of evidence which are applicable to proof of the criminal charge of extortion in the trial before a magistrate. He will be required to prove his cause of action by a fair preponderance of evidence and no more. This rule is well stated by the Court of Appeals in New York & Brooklyn Ferry Co. v. Moore, 18 Abb. N. C. 106, where Earl, J., says: "There is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence. Where a judgment for the plaintiff involves crime or moral turpitude on the part of the defendant, the court should always require satisfactory proof; and when that has been given, judgment should follow regardless of consequences. In no other way can the law be properly administered and private rights effectually protected." The motion will be granted, but, as in my judgment the interests of justice require that pending the action the defendant Elias should be allowed sufficient means for her reasonable and comfortable support, the order to be entered upon the decision of this motion may provide that out of the property which may come into the hands of the receiver to be appointed should be paid to her on the first of each month the sum of $————, and permitting her to occupy, free of rent, the premises ———————— and all the household furniture therein. Her necessary wearing apparel should be entirely excepted from the operation and effect of the receivership and injunction.

Ordered accordingly.

Digitized by Google

DIEDRICH A. MEYER, Plaintiff, *v.* ALBERT G. HALBERSTADT, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Execution, Code Civ. Pro., § 1391 — Retroactive effect of the clause authorizing a judgment creditor to reach his judgment debtor's wages.

The clause added to the Code Civ. Pro., § 1391, in effect September 1, 1903, authorizing certain classes of judgment creditors to reach a certain percentage of their judgment debtor's wages where they exceed twenty dollars a week, applies to a judgment recovered before September 1, 1903.

MOTION by judgment debtor to set aside an order directing that an execution issue against his wages, under section 1391 of the Code of Civil Procedure, as amended September 1, 1903.

Gustav J. Voss, for plaintiff.

Charles W. Culver, for defendant.

BLANCHARD, J. The judgment upon which the execution was issued was recovered January 14, 1903. The judgment debtor contends that as the amendment to the Code authorizing the execution against his wages did not take effect until September 1, 1903, it does not apply to the judgment recovered against him. I do not think this contention should be sustained. *Prima facie* the wages of a judgment debtor would be liable to levy under an execution. Dains v. Prosser, 32 Barb. 290. This amendment to section 1391 of the Code of Civil Procedure provides a mode of legal procedure by which a judgment may be collected out of wages of the judgment debtor by special form of execution, and limits the scope of the remedy of the judgment creditor through that process. The statute does not take away nor impair any vested right of the judgment debtor. The operation of the

Digitized by Google

statute should, therefore, not be confined merely to judgments recovered after it took effect. People ex rel. Collins v. Spicer, 99 N. Y. 225; Matter of Davis, 149 id. 539; Kelly v. Brownlow, 54 N. Y. Super. Ct. 129. It may also be observed that the language of the statute itself would seem to indicate that it was the legislative intent that it should apply to judgments theretofore recovered. The words of the statute are "where a judgment has been recovered."

Motion denied, with ten dollars costs.

SOLOMON R. JACOBS and ARTHUR JACOBS, Plaintiffs, *v.* THE MEXICAN SUGAR REFINING CO., Limited, and THE MEXICAN SUGAR CO., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Jurisdiction of a foreign action when not taken by the Supreme Court.

Although, by service of the summons on the defendants and their appearance in court, the Supreme Court of the State of New York acquires jurisdiction of an action brought in that court by a stockholder of the Mexican Sugar Company, a New Jersey corporation, to restrain it and the Mexican Sugar Refining Company, a Louisiana corporation, from attempting to cancel a lease, of a sugar plantation, situate in the Republic of Mexico, held by the Mexican Sugar Company by *mesne* assignment under the Mexican Sugar Refining Company, from taking advantage of any real or pretended cancellation of the lease and from entering or possessing itself of the plantation otherwise than under the lease and to restrain the Mexican Sugar Company from assisting or co-operating in any way in such cancellation or asserting rights in the plantation otherwise than under the lease, yet where the only property owned by either defendant is located in the Republic of Mexico, the court, both because its mandate if issued would not be enforcible and because the dispute concerns only the internal affairs and management of the defendants, will not take jurisdiction of the action and especially where the plaintiffs have commenced another action in a Federal Court, against the said Mexican Sugar Company, in which they seek the appointment of a receiver.

MOTION to continue an injunction *pendente lite*.

Digitized by Google

Nathan Bijur, for motion.

Austin B. Fletcher (William P. S. Melvin, of counsel), opposed.

GIEGERICH, J. This is an action brought by the plaintiffs in their own behalf and in behalf of other stockholders of the Mexican Sugar Company of New Jersey. No complaint was presented with the papers on which the preliminary injunction and order to show cause was granted, nor has it yet been served. The objects of the action, as stated by one of the plaintiffs in his affidavit on which the preliminary injunction was obtained, are as follows: "This action is brought to set aside any cancellation which may have been attempted by said Mexican Sugar Refining Company of the lease made by it to Max J. Mayer and Samuel S. Lees of said refining company's plantation and buildings in the State of Vera Cruz, Republic of Mexico, which lease was duly assigned to the Mexican Sugar Company, and to restrain and enjoin said Mexican Sugar Refining Company from taking advantage or attempting to take advantage of any cancellation or pretended cancellation of said lease, or from entering upon or taking possession of said premises under such cancellation, or from exercising or asserting any rights to said premises except pursuant to the terms of said lease, and to restrain said Mexican Sugar Company from confirming, assenting or co-operating in any way in such cancellation of such lease or the asserting of such rights to said premises by said Mexican Sugar Refining Company except pursuant to said lease." Both of the defendants are foreign corporations, the Mexican Sugar Refining Company being a Louisiana corporation and the Mexican Sugar Company being a New Jersey corporation, and neither of the corporations has any property or assets in the State of New York, but the board of directors of the Mexican Sugar Company hold their meetings in the city of New York, while the board of directors of the sugar refining company meet solely in the city of New Orleans, although there is an executive committee which has held a meeting in the city of New York. Both corporations have been brought into court by service of the summons upon their

Digitized by Google

officers and by appearances in their behalf. The defendants object to the continuance of the injunction on the ground that where the right to an injunction depends upon the nature of the action the parties must proceed under section 603 of the Code of Civil Procedure and submit the complaint to the court on the application for the injunction, which was not done in this case. The plaintiffs respond to this that at least some of the injunctive relief asked for is extrinsic of the cause of action and should, therefore, be granted, but a careful review of all of the allegations in the plaintiffs' affidavits and of the injunction order convinces me that the right to an injunction depends mainly, if not solely, upon the nature of the action, and, therefore, the continuance of the same should be denied. In People ex rel. Gaynor v. McKane, 78 Hun, 154, 159, it is said: "It is provided in the Code, *inter alia* (§ 603), that when the right to an injunction depends upon the nature of the action, a temporary injunction may be granted when it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff. Jurisdiction under this provision is made dependent upon the presentation to the court or judge of a complaint setting forth facts upon which the plaintiff claims to be entitled to, and upon which he demands, equitable relief;" and in Sanders v. Ader, 26 App. Div. 176, the court said: "The injunction here is asked for under the authority of section 603, where the right to an injunction depends upon the nature of the action. In that case the facts must appear from the complaint and no facts can be considered except such as are set out in the complaint, and facts alleged in an affidavit are not material and cannot be considered unless they are alleged in the complaint. Stuli v. Westfall, 25 Hun, 1. Unless a cause of action is set out in the complaint and an injunction is demanded as a part of the relief sought, an injunction cannot be granted. McHenry v. Jewett, 90 N. Y. 58. The complaint must, therefore, be presented on applying for an injunction, and if he

Digitized by Google

fails to present it the plaintiff does not show that he is entitled to such relief. No complaint was presented here and, therefore, the order denying the injunction was correct and should be affirmed." See also Brass v. Rathbone, 153 N. Y. 435, and Glascoe v. Willard, 44 Misc. Rep. 166. While an injunction was sustained in part in Hallenborg v. Greene, 66 App. Div. 590, owing to the peculiar conditions presented by that case, yet the court said (p. 597): "When a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister State, and it may contravene the public policy of the foreign jurisdiction or rest upon the construction of a foreign statute, the interpretation of which is not free from doubt — as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation — the court should decline jurisdiction because such questions are of local administration, and should be relegated to the courts of the State or country under the laws of which the corporation was organized." But even in that case Chief Justice Van Brunt, in a dissenting opinion, said: "I do not think we can reach anything but the fund here." There is no question but that the court has legal jurisdiction of the defendants; but should it exercise equitable jurisdiction, particularly in the case of the Mexican Sugar Refining Company of Louisiana? How can the judgments and decrees of this court be enforced against that corporation? Such decrees have no extraterritorial force. They can be made effectual only against the property within the State or against individuals or officers of the corporation who are made parties to the action. The only property of which we have knowledge as belonging to the corporations is in the Republic of Mexico. Its corporate affairs are looked after in Louisiana. How could the mandate of this court require action on the part of the board of directors? How could it disturb in any way the holding of the estate in Mexico? It would seem that the only way in which such a judgment could be made effectual would be by invoking the aid of the courts of a foreign country or of a sister State, and this is condemned in Hallenborg v. Greene,

Digitized by Google

supra. In Kimball v. St. Louis & S. F. R. Co., 157 Mass. 7, the question of the equitable jurisdiction of the court was raised. In that case a bill in equity was brought by certain holders of stock in a foreign railroad company, but which had a place of business in Massachusetts and had five of its directors residents thereof. The prayer was that the company be enjoined from issuing certain bonds, except under certain circumstances, and the defendant having demurred, the court held that the plaintiff ought to resort, in the first instance, to that court which alone can declare the law of the case with authority and which can compel obedience to it by force and the bill was dismissed, the court saying in part: "The objection to our proceeding with the case was taken at the outset, and we are of opinion that it must prevail. We assume, for the purposes of decision, that we have jurisdiction in such a sense that, if we proceed to a decree upon the merits, it would be binding in Missouri. But it seems to us clear that, as among the States of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law." This question was also under consideration in Howell v. Chicago & Northwestern R. Co., 51 Barb. 378, and arose upon the question of continuing an injunction *pendente lite.* The court determined that there was no ground for continuing the injunction as against a foreign corporation and referred to the opinion of Roosevelt, J., in Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co., 30 Barb. 159, in which he says (at p. 171): "Foreign corporations, it is true, in some instances, may sue or be sued in our courts. But to warrant the proceeding there must be either a necessity; or a fitness suggested by the peculiar circumstances. The cause of action, or the subject, or at least some property to be acted upon, must have arisen or be situated within our jurisdiction. Indeed, without these qualifications, or one or more of them, the judgment, should the

Digitized by Google

court render it, would be a nullity. It would operate on nothing in the state and be regarded by nobody out of it." And in Howell v. Chicago & Northwestern R. Co., *supra*, Judge Ingraham adds (p. 385): "I do not mean to be understood, that in no cases should the courts exercise jurisdiction; but even if the power exists to compel a foreign corporation to come into our courts and become a party to litigation here, still, where the cause of action arises abroad, where it affects only the internal government of the corporation, where the judgment, if rendered, cannot be in any way enforced against them, except by injunction against individual members of the corporation, and the party has an ample remedy in the state where the corporation has a legal existence, the courts here may well decline exercising an equitable jurisdiction in such a case." Indeed, the plaintiffs seem to have apprehended these difficulties, for from the papers submitted to me it appears that they caused the commencement of another action in the Circuit Court of the United States for the District of New Jersey against the Mexican Sugar Company, in which they seek the appointment of a receiver who will be vested with its estate and with full power to collect and conserve all its property. This action was undoubtedly commenced in the proper forum and the court and its receiver will have full power to preserve all the rights of the plaintiffs in respect to the matters complained of in this action and the court can make an authoritative decree that will be binding upon all of the parties and determine the rights of all. This being the case, I do not think that the courts of this State should be asked to pass upon the same questions without the authority to enforce their decisions, as the Circuit Court of the United States for the District of New Jersey undoubtedly has. The plaintiffs ought not to have two opportunities for trying the same questions in different forums, especially where there is so much doubt as to the right of the courts of this State to interfere.

The motion to continue the injunction should, therefore, be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

Digitized by Google

Matter of the Application of JOHN TOWNSEND for the Appointment of Some Person to Execute Certain Trusts Which may have been Unexecuted by SHEPHERD F. KNAPP, as Receiver of THE BOWLING GREEN SAVINGS BANK OF THE CITY OF NEW YORK.

(Supreme Court, New York Special Term, July, 1904.)

Trust unexecuted — Receiver and referee when appointed.

Where the papers on a motion to confirm the appointment of one McCormick to execute any trust left unexecuted by one Knapp (who died in 1887) as receiver or trustee for the benefit of a savings bank, show that in 1871, one Selmes, then indebted to the bank, conveyed to it certain premises, and alleged by the petitioner to be owned by him and worth $54,000, for the sole purpose of assisting the bank and its receiver in paying its depositors, that, in 1872, Selmes conveyed to Knapp on certain trusts, that in 1889, Selmes conveyed to one Lockwood all his right in the said premises as well as his reversion upon termination of the trusts, the petitioner claiming to have succeeded to that interest, and that Knapp never conveyed the premises nor accounted for trust moneys with which a decree had charged him, the court will appoint a receiver with full power in place of Knapp to realize upon the interest in the premises as well as upon the unadministered assets and ascertain whether at his death Knapp had accounted for the moneys with which the decree charged him.

MOTION to confirm the appointment of William J. McCormick to execute any trust which may have been left unexecuted by Shepherd F. Knapp, as receiver or as trustee for the benefit of the Bowling Green Savings Bank of the city of New York.

Harold Swain, for petitioner and motion.

Eugene L. Bushe, for John Fox and other defendants, opposed.

GIEGERICH, J. This is a motion to confirm the appointment of William J. McCormick to execute any trust which may have been left unexecuted by Shepherd F. Knapp, as

Digitized by Google

receiver or as trustee for the benefit of the Bowling Green Savings Bank of the city of New York. Mr McCormick's appointment was made upon notice to the Attorney-General and upon an order to show cause published in the New Law Journal in pursuance of the terms of said order to show cause. After his appointment Mr. McCormick examined the papers on file in the said receivership, and finding that certain appearances had been made in the proceedings, caused notice to be given to the survivors of the parties and attorneys who had appeared, and certain depositors have appeared in opposition to the motion. The object of this proceeding is to obtain a release of certain premises conveyed, with others, by one Reeves E. Selmes and wife to the said bank, by deed bearing date November 20, 1871, which contains the following clause: "The true meaning and intent of this conveyance being to transfer absolutely all the right, title and interest of the parties of the first part in and to all of the above described property to the said The Bowling Green Savings Bank to assist said bank, its receiver or legal representatives in paying the lawful demands of its depositors, and it is hereby understood that this conveyance is given and taken upon the express condition that the avails of the property described herein shall be sacredly applied to the liquidation of the claims of said depositors." Selmes and his wife subsequently conveyed the premises in question, with others, to the said Shepherd F. Knapp, upon certain trusts, by deed dated February 28, 1872. By deed dated March 7, 1889, and recorded March 22, 1889, Selmes and his wife conveyed to one Josiah Lockwood all their right, title, claim and demand and interest of, in and to the premises in suit, and all the right of reversion upon the ceasing of the trust contained in the two deeds last above mentioned. The petition upon which the order appointing Mr. McCormick was granted alleges certain facts tending to show that the petitioner has succeeded to the interest of said Josiah Lockwood. The petition also alleges: "Some question has been raised as to the validity of your petitioner's title to said premises, on the ground that there is no record proof of any sale or conveyance thereof having been made by the said Shepherd

Digitized by Google

F. Knapp, as receiver or as trustee for the benefit of The Bowling Green Savings Bank of the city of New York, and that, therefore, the trust as to said premises may have remained unexecuted." The replying affidavit of Mr. McCormick in the present application alleges upon information, without, however, disclosing the sources of such information, that the premises "are in the possession of the petitioner herein, claiming ownership thereof in fee; that an adverse title appears from the records in the register's office to have been outstanding since 1858, and that no taxes have been paid on said premises since 1870, and that said premises have several times been sold for unpaid taxes and assessments." It appears from the affidavits submitted that when Selmes executed the last-mentioned deed to Lockwood in 1889, Knapp, the receiver, was dead, his death having occurred about two years before; that the depositors had been paid but thirty-five per cent. of the amount of their claims; that they have not been paid anything since, and that there are not any other assets available for the payment of their claims except the premises in question, which are alleged by depositors to be of the value of $54,000, and certain uncollected assets of the nominal value of $166,953.77, as reported in the account filed by Knapp in 1875. What these assets consisted of or what has become of them is not shown. Neither is it shown what became of certain moneys, aggregating nearly $30,000, left in the hands of Knapp for purposes designated in a decree of this court made in 1877, $23,688.99 thereof being a special deposit reserved for contested claims, then still undecided, and $5,618.72 for dividends uncalled for. It appears, furthermore, that Selmes was indebted to the said The Bowling Green Savings Bank, but in what amount does not appear, nor has it been shown whether or not any part of the debt has been paid. In view of the absence of information regarding these most essential facts, and of the meager character of the allegations of the petitioner's affidavits respecting his alleged interest in the premises, I am unable to determine what interest, if any, the bank or the receiver has therein, or upon what terms such interest should

Digitized by Google

be released, if at all, or whether this motion ought to be granted. It would seem, however, that a receiver in place of Shepherd F. Knapp, deceased, should be appointed and authorized to realize upon such interest, as well as upon the unadministered assets above referred to, and to ascertain whether any portion of the moneys left in the hands of receiver Knapp at the time of the decree above referred to remains to be accounted for. On the other hand, if the petitioner has an interest of the character claimed by him, no reason is shown why he could not bring an action under the provisions of the Code of Civil Procedure (chap. 14, tits. 1 and 5) to compel the determination of a claim to real property. All the parties in interest may, however, find it expedient to have the matter referred to a referee to ascertain and report upon the facts and the interest of the parties in the premises in controversy, but such reference will only be ordered upon the written consent of the survivors of the parties and attorneys who have appeared in proceedings connected with the accounting proceedings of receiver Knapp and upon the stipulation of the petitioner that it will be solely at his expense. In any event, however, a receiver with full powers and responsibilities should be appointed. Except as above indicated, motion denied, without costs.

Ordered accordingly.

JOHANNA GADSKI-TAUSCHER, Plaintiff, *v.* CLARENCE L. GRAFF, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Attachment — Attorney when personally liable to sheriff.

Where the defendant's attorney procures, upon a counterclaim of his client, an attachment against the plaintiff's property and has the sheriff levy thereunder on a debt due the plaintiff and the debtor gives the sheriff a certificate of the indebtedness and the attachment is subsequently vacated upon the ground that

Digitized by Google

the papers upon which it was granted were insufficient in law to justify its issue, the attorney is personally liable to the sheriff for his pounage as fixed in his county by law.

MOTION made by the sheriff of New York county for an order to tax his poundage and directing the payment thereof by the defendant's attorney.

James W. Gerard, for motion.

Walter M. Rosebault, opposed.

GIEGERICH, J. This motion is made on the following state of facts: On March 4, 1904, the sheriff received a warrant of attachment directing him to attach so much of the property of the plaintiff within this county as would satisfy the defendant's counterclaim of $2,650. On the same day the attachment was levied upon a debt or demand of $3,500 then due to the plaintiff from Schultz & Ruckgaber, of this city, and the sheriff, on the 9th of March, 1904, received from that firm a certificate showing an indebtedness to the plaintiff by the firm of $3,500. Thereafter the plaintiff moved to vacate the attachment upon the ground that the papers upon which it was granted were insufficient in law, and such proceedings were had thereon that on the 25th of April, 1904, an order was made and entered vacating said attachment upon that ground and the same was served on the sheriff on the 1st day of June, and the property attached was released pursuant to its requirements. Thereupon the sheriff presented his bill for his fees and charges, amounting to ninety-one dollars and twenty-five cents, to the defendant's attorney, who obtained the warrant, but he has refused to pay the same and still refuses to do so, maintaining that he is not liable for the same and that there is no proof that any property was actually levied upon under the attachment. He does not, however, deny that the firm on whom the attachment was served gave the certificate required by section 650 of the Code of Civil Procedure, and thereafter they would have been estopped

Digitized by Google

from denying that they held that sum for the plaintiff unless excusable error was made in giving the certificate, which does not appear in this case. The poundage claimed by the sheriff of ninety-one dollars and twenty-five cents is entirely correct under the rates fixed by chapter 418 of the Laws of 1892. Both by section 709 of the Code of Civil Procedure and chapter 418 of the Laws of 1892, relating to the fees of the sheriff of New York county, this poundage is taxable and payable at this time and is to be collected either from the attached property, or that failing, from the person whose property is attached, or from the person at whose instance the process was issued by the sheriff. It has been repeatedly held that such fees cannot be collected from the party against whom the attachment issued where it was subsequently vacated and annulled. O'Brien v. National Conduit & Cable Co., 43 Misc. Rep. 327; Bowe v. United States Reflector Co., 36 Hun, 407; Lawlor v. Magnolia Metal Co., 2 App. Div. 552. In Plummer v. International Power Co., 88 App. Div. 455, the learned judge delivering the opinion of the court said: "When the attachment is vacated or discharged by order of the court, and the service of the sheriff has been fully performed and ended and the whole process has performed its office, the statute gives the right to poundage, irrespective of other conditions, and then the jurisdiction of the court attaches to require the party liable for the poundage to pay the same to the sheriff." It is true that in Treadwell & Co. v. Mead Mfg. Co., 75 App. Div. 478, the Appellate Division held that there was no authority in the court, after the discharge of a levy under an attachment, to order either party to the action to pay the sheriff's poundage, but that was decided in an action which had been settled between the parties and an order of discontinuance entered, and the only question presented on the appeal was whether, under such circumstances, authority existed to order the payment of the sheriff's poundage. As was pointed out by the Appellate Division of the Second Department in Esselstyn v. Union Surety & Guaranty Co., 82 App. Div. 474, 478, that case did not relate to one where the attachment had been vacated, set aside or discharged by

Digitized by Google

order of the court, and affirmed an order taxing the sheriff's poundage and requiring the defendant to pay it; and this has been followed in this department by Mr. Justice Leventritt in McKenzie v. Industrial Federation of Am., N. Y. L. J., Dec. 22, 1903. In Commercial Wood & Cement Co. v. Northampton Portland Cement Co. the sheriff of New York county made a motion to compel the plaintiff to pay his bill and the point was there taken that to compel the plaintiff on a motion under the statute under consideration to pay the sheriff's bill was depriving him of property without due process of law, but the justice granted the motion without writing any opinion and ordered the plaintiff to pay the bill. From this there was an appeal to the Appellate Division of the First Department, but the court, on February 19, 1904, affirmed the order, without opinion, 91 App. Div. 614. See also Amato v. Jacobus, 58 Fed. Repr. 856.

The only question remaining is whether the attorney issuing the process is liable for these fees. This was decided in the affirmative as early as Adams v. Hopkins, 5 Johns. 252, 254, where the court said: "I think also, that the sheriff has a right to look to the attorney for this poundage. He is his immediate employer. The attorney cannot be considered as acting in the character of a known agent, so as to charge the sheriff with giving credit to the principal. The sheriff has no discretionary power left him, whether to perform the service or not. He is bound to execute every legal process delivered to him, before he can demand his fees. All reasonable security ought therefore to be extended to him, to insure a compensation for his services. He cannot be presumed to be acquainted with the residence or responsibility of parties. Very different is the situation of the attorney. He is not bound to undertake any suit, nor incur any responsibility, without a reasonable indemnity, if suspicious of his employer." This case has been frequently followed, and in Campbell v. Cothran, 56 N. Y. 279, was established as the law of this State on this question, where the court said (p. 280): "This question (whether the sheriff could collect from the attorney) was decided by the Supreme Court in 1810, in the case of Adams v. Hopkins, 5 Johns. 252.

Digitized by Google

* * * This decision has been followed in subsequent cases, Ousterhout v. Day, 9 Johns. 114; Trustees of Watertown v. Cowen, 5 Paige, 510; Camp v. Garr, 6 Wend. 535. It may well be doubted whether the rule laid down in Adams v. Hopkins can be maintained upon principle, or is consistent with the general current of judicial authority elsewhere. Judson v. Gray, 11 N. Y. 408. But it has been for more than sixty years the law of this State. No practical injustice results from enforcing it, as attorneys act in view of the liability they incur in issuing executions, and it ought not now to be disturbed." The motion should, therefore, be granted and an order made taxing the sheriff's bill at ninety-one dollars and twenty-five cents, and directing the defendant's attorney to pay the same to the sheriff within such time as shall be specified in the order, which may be presented on two days' notice. No costs.

Ordered accordingly.

Matter of the Application of the NEW YORK SABBATH COMMITTEE for an Order Pursuant to the Provisions of Chapter 22, Title 2, Section 1476 of the Greater New York Charter (Chap. 378 of the Laws of 1897) and the Acts Supplemental thereto and Amendatory thereof, Revoking and Annuling the License Granted to PERCY G. WILLIAMS Pursuant to the Provisions of Said Charter.

(Supreme Court, New York Special Term, July, 1904.)

New York City — Revocation of theatre license — "New York Sabbath Committee."

Where no more information as to the corporate powers of the "New York Sabbath Committee" is afforded on a motion made by the committee, under section 1476 of the charter of the city of New York, to revoke a license granted by the city to a city theatre, because of an alleged violation of the provisions of title 2 of chapter 22 of that charter, than the fact that the committee is a domestic corporation, the application must be denied as there is nothing to show that the act is within the corporate powers of the committee.

Digitized by Google

MOTION to revoke a theatrical license.

Manice & Perry (John M. Perry, of counsel), for motion.

House, Grossman & Vorhaus (Frederick B. House, of counsel), opposed.

GIEGERICH, J. This application is made under section 1476 of the Greater New York Charter to revoke the license issued to the respondent for the Circle Theater, in the borough of Manhattan, city of New York. The application is made by the New York Sabbath Committee, which is, according to the petition, "a domestic corporation duly organized and existing under the laws of the State of New York," but nothing further is shown in regard to it or what its corporate purposes or powers are. The motion is resisted upon two grounds: (1) That the court has no jurisdiction to act, except in a proceeding instituted in the name of the city of New York and by the corporation counsel as its attorney; and (2) upon the ground that even if any one other than the city can institute the proceeding, it is not shown that such an act is within the corporate powers of the petitioner. In support of this latter claim a decision of the General Term of the Supreme Court in Ancient City Sportsman's Club v. Miller, 7 Lans. 412, is cited, in which it was held that an act which authorized incorporations for social, gymnastic, esthetic, musical, yachting, hunting, fishing, batting or lawful sporting purposes, does not allow incorporations for the purpose of instituting actions to recover penalties for violations of the game laws. Under the principle of that decision I think that the preliminary objection should be sustained. The motion, is, therefore, denied, but without costs, and without prejudice to a renewal of the application.

Motion denied, without costs.

Digitized by Google

SOPHIE FALLER, Plaintiff, v. JESSICA M. RANGER, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Bill of particulars.

When the plaintiff serves an insufficient bill of particulars, the defendant need not move for a new bill, but may return the one served with a notice endorsed thereon that it is insufficient and wherein insufficient.

MOTION by plaintiff to compel the acceptance of a bill of particulars.

John Conville, for motion.

Tison, Goddard & Brewster (Alexander Tison, of counsel), opposed.

GIEGERICH, J. The plaintiff having been directed by an order of court to furnish a bill of particulars served one which plainly failed to comply with the terms of the order, whereupon the defendant returned the bill with a notice indorsed thereon that it was insufficient and irregular in not complying with the order and further specifying in what respects it failed to so comply. A motion is now made on behalf of the plaintiff to compel the acceptance of service of the bill, the ground taken being that the remedy of the defendant was not to return the bill, but to move for a further one. The only decision cited as authority on this proposition is Barnes v. Henshaw, 21 Wend. 426, which is a case very different from the present, because there the defendant waited until the trial and then attempted to raise objections to the sufficiency of the bill, the court saying (p. 429): "He was not to lay by in the way he had done, and then move to set aside the proceedings." It is obvious that this case and the authorities therein cited dealt with the question of when the objection should be raised and not

Digitized by Google

the manner in which it should be raised. This motion, on the other hand, presents only the point of practice as to whether the insufficient bill must be accepted and the question of its insufficiency raised by a subsequent motion made on behalf of the aggrieved party, or whether it may be rejected and the burden of making a motion to test its sufficiency cast upon the plaintiff. I can see no reason why the latter practice, here followed by the defendant, should not be approved. The only authority I have been able to find closely upon the point is Ward v. Littlejohn, 17 Civ. Pro. 178, decided at the General Term of the Second Department, in which it was stated that the defendant could take his choice and either return the bill furnished or demand a further bill, the court saying (p. 180): "Neither was it necessary to make a new and specific demand for further particulars. It was enough to return the bill already furnished, if it was defective, and demand that the previous order should be complied with, and a proper bill furnished, or to demand a further bill." The motion is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

AUGUST SCHIECK, Plaintiff, *v.* ANNIE DONOHUE et al., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Surplus moneys.

Where a new claim for surplus moneys is filed between the time of the application for the reference and that of the entry of the order, the claimant must, under Rule 64 of the General Rules of Practice, have notice, *nunc pro tunc*, of the application for a reference before the justice can sign the order.

THE facts are sufficiently stated in the opinion.

J. Wilson Bryant, claimant, in person.

Peter Cook, for plaintiff.

GIEGERICH, J. It appearing that, since the motion for a reference to ascertain and report as to who is entitled to the

Digitized by Google

surplus moneys was made and granted, a new claim has been filed, the proposed order cannot be signed at present. Rule 64 provides that all who file a notice of claim previous to the entry of the order of reference shall be entitled to notice of the application for the reference. It is obvious, however, that such notice may be given *nunc pro tunc* when, as here, the claim is filed intervening the application and the order. Upon proof of the giving of such notice and of notice of settlement of the order and in default of any objection from the new claimant I will sign the order submitted.

Ordered accordingly.

MORRIS SLATTERY, Plaintiff, *v.* WILL McCAW, Defendant.

(Supreme Court, Ontario Special Term, July, 1904.)

License or permission cannot give an adverse right — Rights above the surface of a street.

An adverse right of easement cannot grow out of a mere license or permissive enjoyment.

The public occupy the surface of a street and to its use as a street the rights of abutting lots are subservient, but, above the surface, there can be no lawful obstruction to the access of light and air to the injury of an adjoining owner. The existence of such an obstruction — without his consent — gives him a right of action against the individual obstructing.

ACTION for an injunction.

Frank Rice, for plaintiff.

Charles A. Hawley, for defendant.

DAVY, J. This action is brought to restrain the defendant from erecting a three-story bay-window in front of his property and also from removing the end of an iron fence and the foundation thereof.

Digitized by Google

The plaintiff and defendant are owners of adjoining buildings, fronting on South Main street in the city of Geneva, which were erected fifty or sixty years ago. Both residences form a part of what is known as the Hudson Block and are three stories in height and their fronts constitute the street line. The residence of the plaintiff is north of the defendant's with a brick wall between. In front of the plaintiff's residence there is an areaway or excavation constructed for the purpose of furnishing light and air to the basement used as a dining-room and kitchen. A fence or railing incloses this areaway protecting those passing along the sidewalk from falling into the excavation. This railing is of iron and is about two feet eight inches in height, the portion in front being about three feet nine inches from the front wall of the building. The areaway is some five feet or more in depth. Outside of this areaway and under the sidewalk there is a coal cellar. The end of the iron rail on top of this fence projects beyond the south line of the division wall about an inch and a half. The railing upon the north end is extended at right angles to the front wall of plaintiff's house. The south end of plaintiff's areaway is not inclosed by the railing. The steps and railing of defendant's porch come close up to plaintiff's projecting railing.

The plaintiff contends that he has acquired title to the strip of land in question and the right to maintain this areaway and encroachment upon the public street by adverse possession.

It is conceded that the east line of Main street is the west boundary of the property of the plaintiff and defendant, and that that line is the face of the front wall of the buildings and that neither party has any paper title to any part of Main street.

The mere fact that the top railing to the iron fence in front of the areaway extends over the line in front of defendant's premises, and has for a number of years, is not sufficient to constitute an adverse possession. It seems to me very clear that such occupation was merely permissive on the part of the municipality and likewise the

Digitized by Google

defendant, and, therefore, constituted no title by adverse possession. An adverse right of possession cannot grow out of a mere license or permissive enjoyment. It was not adverse to the defendant, because he had no legal title to the soil. It is an obstruction in the highway in front of his premises which he has a right at any time to have removed. It is common in villages and cities to permit the adjacent owners to use a part of the street or sidewalk for areaways, especially where the sidewalks are wide and where the areaways do not interfere with the public travel. This is usually understood to be a mere license, permissive only and liable at any time to be revoked and closed up by the municipal authorities as a nuisance. It would be contrary to the rights of the public to consider such use of the streets or sidewalks as adverse and that a party could obtain title thereto by adverse possession.

It is a well-settled rule of law that the long continuance of such encroachments in the highway, although for more than twenty years, cannot destroy the public right or take away the authority of the public officers to remove and abate them. The municipal authorities have control of the streets of the city of Geneva and their duties to a certain extent are governmental for the benefit of the public and the public cannot be barred by their neglect of duty. St. Vincent Orphan Asylum v. City of Troy, 76 N. Y. 114.

In People ex rel. Wooster v. Maher, 141 N. Y. 335, Chief Judge Andrews said: "Upon the facts found and proved there can be no reasonable doubt that the porch is an unlawful obstruction in the street and a public nuisance. Although originally built with the consent of the city, the municipality could not legalize the structure so as to bar the public right, and the user, though long continued, is no obstacle to proceedings for its removal. All the remedies, public and private, for the abatement of encroachments in highways or public streets, are open and unaffected by the colorable authority under which the porch was erected, or by acquiescence in the unlawful user."

It was held in Driggs v. Phillips, 103 N. Y. 77, that the occupation of a portion of a highway by an individual is

Digitized by Google

a mere obstruction and nuisance for which no lapse of time will enable him to claim title and no acquiescence on the part of the highway officials of the town will deprive the public of the right to use the highway, or in any degree lessen the duty of such officials to remove the obstruction when that removal is necessary.

Neither the plaintiff, therefore, nor any of his grantors have acquired title to the *locus in quo* or any part of it. That portion of the iron rail which extends over the line in front of defendant's premises is an obstruction which the defendant is entitled to have removed.

Upon the other point I do not agree with the learned counsel for the defendant, that the plaintiff has no right to restrain the defendant from building the bay-window as contemplated.

It is a rule well settled that the owners and occupants of premises along the street have a right to have it kept open, so that from the street access may be had to the abutting premises and they are also entitled to have the light and air that may come across the highway and open space. The public occupy the surface of the street and to its use as a street the rights of the abutting lots are subservient, but above the surface there can be no lawful obstruction to the access of light and air to the injury of the abutting owners; and when any person attempts to close it or any part of it above the surface of the street, so that the light and air are in any way obstructed, without his consent, he has a right of action against the individual. The easement of light and air is a property right within the meaning of the Constitution, which cannot be taken away from him without due process of law. The plaintiff has the right to the unobstructed passage of light and air into his windows from the street, which are essential to the beneficial use and enjoyment of his property. That while the defendant may build on his own land and obscure the plaintiff's view and obstruct the light and air, yet he cannot build in the highway and thus injure him.

In Wakeman v. Wilbur, 147 N. Y. 663, Judge O'Brien said: "The obstruction of a public highway is an act which

Digitized by Google

in law amounts to a public nuisance, and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and to recover the special damages by him sustained."

It was said by Judge Andrews in Pond v. Metropolitan El. R. Co., 112 N. Y. 188, that: "The Story Case, 90 N. Y. 122, established the principle that an abutting owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation."

In Woodruff v. Paddock, 130 N. Y. 625, Judge Earl said: "An abutting owner has two distinct kinds of rights in a highway or street. A public one, which he enjoys in common with all other citizens; and certain private rights, which arise from his ownership of property contiguous to the highway or street. These special rights increase the value of his abutting premises, are private property, and, if they are destroyed or greatly injured without due process of law, damages may be recovered for the injury."

It appears, from the testimony taken upon the trial, that the erection of the bay-window contemplated by the defendant would interfere to a substantial degree with the light and air coming to the plaintiff's house and would interfere with certain views from plaintiff's windows, which are essential to the beneficial use and enjoyment of his premises and would also tend to depreciate the value of his property.

The temporary injunction, therefore, granted herein should be modified so as to permit the defendant to saw off and remove the iron railing in front of his premises and the foundation thereof, unless the plaintiff within sixty days from the date of filing this decision remove the same. With that modification the temporary injunction is made permanent. No costs are allowed to either party.

Ordered accordingly.

Digitized by Google

Matter of the Application of the Freeholders of the Towns of MADRID, WADDINGTON and LOUISVILLE, for the Building of a Bridge across Grass River at or near Chase's Mills.

(Supreme Court, St. Lawrence Special Term, July, 1904.)

Highway — Liability of adjoining towns, divided by a stream, for the cost of constructing a bridge over the same — It exists whether the stream runs along or traverses the dividing line.

Section 130 of the Highway Law provides, "The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges, constructed over streams or other water within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries * * * and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses."

Section 134 of the Highway Law provides, "Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines."

Section 136 of the Highway Law provides, "Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the commissioners of highways in each of such towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of the commissioners, at least eight days before the hearing, may apply to the supreme court at a special term thereof."

Held that the term "streams dividing such towns," used in section 136 was intended to be synonymous with the term "streams upon their boundaries," used in section 130, and that the remedy afforded by section 136 extended to all cases in which liability was imposed by section 130.

That section 136 applies to a case where the stream does not run along the line dividing adjoining towns, but traverses such line.

Digitized by Google

PETITION by the freeholders of the towns of Madrid, Waddington and Louisville, in the county of St. Lawrence, for an order directing the commissioners of highways of said towns to build and maintain a bridge across Grass river at Chase's Mills at the joint expense of said towns.

Kellogg & McCarthy (A. X. Parker, of counsel), for petitioners and town of Louisville.

Frederic J. Merriman, for town of Madrid and highway commissioners of Madrid.

Robert E. Waterman, for town of Waddington.

SPENCER, J. A petition by freeholders of the towns of Louisville, Madrid and Waddington, in St. Lawrence county, to require the commissioners of their respective towns to build and maintain a bridge across Grass river at or near Chase's Mills, in said county, came on to be heard at a term of this court in March, 1903, and the court, regarding the case as a doubtful one, made an order referring the matter to a referee to ascertain the facts and report the evidence. The referee has made his report bearing date February 20, 1904. This is an application by the petitioners upon the report and evidence for the court to make the order prayed for in the petition. Argument was had at the St. Lawrence Special Term in May, but briefs of counsel were not submitted until the seventh day of July. As the referee has accompanied his report with a careful opinion upon the questions of law involved, I have been thereby relieved of much work that otherwise would have been necessary.

I am fully in accord with the opinion of the learned referee that the proceedings to open and lay out a highway along the line dividing the towns of Louisville and Madrid, so as to connect with the end of the highway at low-water mark in the line dividing the towns of Louisville and Waddington, were regular, and that there is now a lawful highway existing across Grass river at the place where the bridge is sought to be built.

I am also in accord with the views of the learned referee

Digitized by Google

to the effect that the towns of Louisville, Waddington and Madrid are, under the provisions of section 130 of the Highway Law, liable to pay the expense of constructing and maintaining a bridge at the place indicated in the petition; and am fully in accord with the reasoning which he gives for that conclusion. I do not, however, agree with him in his construction of section 136 of the Highway Law to the effect that the remedy thereby afforded is not as broad as the liability imposed by section 130.

The provisions of the statute, section 130, bearing upon this subject, when brought into juxtaposition, read as follows:

"The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges, constructed over streams or other water within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries * * * and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses."

Section 134 provides: "Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines."

Section 136 provides: "Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the commissioners of highways in each of such towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, re-build or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of the commissioners, at least eight days before the hearing, may apply to the supreme court at a special term thereof."

Digitized by Google

The referee places his decision upon the different terms employed, viz.: the words "streams upon their boundaries," in section 130, imposing the liability, and the words "streams dividing such towns," in section 136, providing the remedy. I am, however, of the opinion that no such presumption arises from the employment of these different expressions, and that the stronger presumption is that the Legislature would not have imposed a liability without providing a remedy whereby such liability might be enforced, and especially so, inasmuch as it did, as conceded, provide a remedy for a part of that liability.

The liability is imposed upon towns to construct bridges over "streams or other waters upon their boundaries," and the stream and bridge in question fall literally within the terms so employed. Thus, by the express language of the statute, liability is imposed upon each of the several towns involved in this controversy for the expense of constructing the bridge referred to. Now, shall we say, that because, in section 136, in providing for the proceedings to enforce the liability, the Legislature made use of the term "streams dividing such towns," it intended to create a distinction so that in one case the liability might be enforced, and in the other it might not? I think not. Such a construction would not be in accord with the history of legislation upon this subject. The statute of 1841 (chap. 225, § 1) provided as follows: "Whenever any adjoining towns shall be liable to make and maintain any bridges over any stream dividing such towns, such bridges shall be built and repaired at the equal expense of said towns, without reference to town lines."

It is true that the Court of Appeals, in commenting upon this provision (without construing it, as at the time of its comments the provision had been repealed) said that it had application only to "bridges over a stream dividing the towns," but in 1857 (chap. 383, § 1), with the view, as the court says, of obviating such a difficulty, and rendering the act applicable to every case where a bridge is situated in part in two or more towns, without reference to the question whether the stream divides the towns, or the town line intersects or crosses the stream, and divides the bridge longitudi-

Digitized by Google

nally, the legislature amended the section and made it read as follows: "Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of said towns, without reference to town lines." Lapham v. Rice, 55 N. Y. 472, 479; Day v. Day, 94 id. 153, 156.

The statute continued in these terms until the adoption of the Highway Law in 1890 (Laws of 1890, chap. 568; Laws of 1902, chap. 321) which was the work of the Revision Commission, and was intended as a re-enactment of pre-existing statutes. As was the well-known custom of that commission, verbal changes were made in existing statutes on tautological grounds, and so we find here, as in other instances, the use of a variety of expressions, but all intended to convey the same sense. It certainly cannot, without the clearest evidence, be believed that it was intended to restore the defective act of 1841. Especially is this so in the presence of the fact that the amendment of 1857 has been retained intact in section 134 of the present law. The object to be obtained by the original passage of that amendment is stated by the Court of Appeals as follows: "The original act only embraced cases where the streams separated the towns; in other words, where they abutted thereon and the stream run along the line. By the amendment, towns lying upon both sides of the stream, where a bridge was necessary upon the lines thereof, were embraced; in short, it was made to include all towns in which any part of the bridge was located, and all were required to contribute jointly to the expense, without reference to town lines; that is, without regard to the particular part located in any town." 55 N. Y. 472, 479. I think it is, therefore, beyond question that under the statute the three towns are jointly liable to build and maintain the bridge in question.

We thus come to the question, whether the statute authorizing the present proceedings is broad enough to include a case where the stream does not run along the line dividing the towns. If it does not, it must be clearly an oversight in legislation, as no good reason exists for making the proceedings applicable in one instance and not in the other.

Digitized by Google

So far as I know this method of procedure did not exist prior to 1857. In that year the Legislature (only three days after the passage of the amendment extending the liability hereinbefore referred to) passed an act (Laws of 1857, chap. 639) whereby it provided for these proceedings by freeholders and for the raising of money by tax to defray the expenses of building bridges which might be ordered in such proceedings. In specifying when such proceedings might be instituted, it made use of these words: "Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns * * * it shall be lawful for three freeholders," etc.

Standing alone this provision might very well, under the *dictum* of the Court of Appeals above referred to, be held to apply only to adjoining towns divided by a stream running along the dividing line, but this provision, as we find it incorporated in the revision (Highway Law, § 136) does not stand alone, and must, therefore, be construed in connection with the other provisions of that law. The liability and the proceedings to enforce the same are treated in a general law which is supposed to cover the entire subject. There are provisions which make it the duty of towns having streams on their boundaries to build and maintain bridges at their joint expense without regard to town lines, and no good reason can be found for not providing a method for enforcing the performance of this duty in its entirety. The words in the section (136) relating to the proceedings are not to be construed in a strict technical sense as would be our duty if they were employed to limit obligation; but we should regard them as employed in a general and latitudinal sense, and as having express reference to those other provisions where duty and liability are imposed.

The granting of authority to commissioners of any such towns to build bridges and sue to recover from the other towns their proportionate share does not militate against this construction. It would be a strange result if the right of freeholders to institute proceedings should depend upon the question whether a town line traverses the stream or runs along it longitudinally.

Digitized by Google

But be this as it may, I am of the opinion that within the rules of statutory construction, the three towns in question are adjoining towns and that the Grass river divides them from each other. The towns confessedly adjoin and so clearly satisfy the terms of the statute in that regard. Towns contiguous only at corners have also been so regarded. Holmes v. Carley, 31 N. Y. 289. If that part of Louisville which lies south of the river constituted a separate town and there were, therefore, four towns whose corners came into contiguity at the center of the stream, I think there would be no confusion in saying that the river divided all four towns from each other. Certainly, this would be so if it be true that towns which touch only at corners are adjoining towns. If anything divides them, it is of necessity the river. I do not see how the case is changed by the situation of the towns here. The fact that Louisville extends on both sides of the river certainly has not that effect; nor does the fact that Madrid extends only to low-water mark. The river still divides them even if the place of their contact consists of a point only. Adopting the logic and the reasons set forth in the opinion of Judge Potter in the case last cited, I am constrained to the view that the proceedings were authorized by the letter and intent of the statute.

The petitioners may, therefore, take the order prayed for, and as authorized by section 136 of the Highway Law.

Order may be settled upon three days' notice. The question of costs reserved until then.

Ordered accordingly.

LELA S. BOSEA, Plaintiff, *v.* HARRIET F. LENT, Defendant.

(Supreme Court, Schenectady Trial Term, July, 1904.)

Consideration.

A deed, delivered in *escrow* to the grantor's agent, to be delivered by him to the grantee if the grantor got drunk again, is void for lack of a consideration both for the delivery and for the deed.

ACTION by plaintiff to have canceled of record, for lack of consideration, a deed delivered in escrow.

Digitized by Google

John D. Miller, for plaintiff.

Yates & Groupe, for defendant.

KELLOGG, JOHN M., J. Plaintiff asks judgment that she be declared to be the owner of certain real estate subject to the dower interest of the defendant, Harriet F. Lent, her mother, and that the deed of said premises given by F. Raymond Lent, deceased, her father, to the defendant, Harriet F. Lent, her mother, be canceled of record. This deed was executed by F. Raymond Lent, July 10, 1903, and left with D. M. Chadsey, the attorney who prepared it, and at the time the said Chadsey made the following indorsement upon said deed: "This deed was delivered to me as an escrow by the grantor, to be handed over to the grantee or her heirs on the happening of this event, and not before, on the grantor's getting drunk again after this date. Dated, July 10, 1893. D. M. Chadsey," and that indorsement fairly represented the understanding and only consideration upon which such deed was executed. After the death of the grantor, the said Chadsey upon receiving the affidavit of the wife that the husband had been drunk since the date of the deed delivered the deed to her and she caused it to be recorded. Upon the trial the jury made a special finding that the grantor did not get drunk after the date of the deed. The defendant now moves to set aside that verdict as against the weight of evidence, and the plaintiff now moves for the judgment demanded in the complaint. It is unnecessary to determine whether the verdict is or is not sustained by the evidence, for the reason that the defendant has shown no defense to the plaintiff's claim.

A delivery in escrow presupposes a valid contract pursuant to which the deposit is made. And if the condition of the escrow is performed but the deed is not delivered during the lifetime of the grantor, the delivery is nevertheless sustained. Stanton v. Miller, 58 N. Y. 192.

This is not a deed in escrow because not made pursuant to any valid contract and not depending upon any condition to be performed by the grantee, but the condition depended en-

Digitized by Google

tirely upon the volition and act of the grantor himself. Neither was it a delivery to a third person for the benefit of the grantee so as to pass title, for it was accompanied with a condition and the terms of its delivery showed an intention not then to pass title. Crain v. Wright, 36 Hun, 74; 114 N. Y. 307.

The deed was, therefore, left with Chadsey as the agent of the grantor, to be delivered by him if the grantor got drunk again, and can have no greater effect than a mere agreement of Lent that in case he did get drunk again he would execute and deliver the deed. The deed not having been delivered to the grantee in the lifetime of the grantor, any authority in Chadsey to deliver it, so far as he was representing the grantor, terminated with the grantor's death, and the deed can only be sustained by showing that a valid agreement was made upon sufficient consideration for the transfer of this property to the defendant. It is undisputed that the husband might give his property to the wife without any consideration, might give it to her for the reason that he became intoxicated and that it was unsafe in his hands, or that he felt that it was a fair and just compensation to her for the trouble and annoyance which she suffered on account of his intoxication, or for love and affection. But he did not deliver the deed; he simply agreed to deliver it, and the agreement is without any consideration whatever. An executory contract to be of force must be mutually binding, and there must be a consideration passing from each party as an agreed equivalent for the consideration to come from the other. Here the husband has simply agreed to forfeit his property in case his appetite gets the better of his judgment. The wife has agreed to do nothing, and has done nothing. She is simply to receive the benefit if the husband gets drunk. He is to get no benefit or advantage directly or indirectly from the terms of the agreement. It will not do to say that it was deemed that if he got drunk again the property was unsafe in his hands and was to be put in the wife's hands for safety, because that represents a mere matter of family policy and expediency resting entirely in promise but devoid of all consideration. And while a court of equity will many

Digitized by Google

times sustain transfers by the husband to the wife on account of the duty and obligation for the support and maintenance of the wife, it is against public policy to have these agreements in a family by which each may forfeit to the other all or a part of his or her property on account of certain shortcomings which he or she may have. It sets each party in the position of benefiting by the frailties and mistakes of the other, and it cannot be sustained upon the theory of public policy. So far as the idea enters that the wife was to live with and care for the husband, it can furnish no consideration, because that is a duty resting upon her growing out of the marital relation.

We are cited to the case of Hamer v. Sidway, 124 N. Y. 538, where the uncle agreed to give the nephew $5,000 if he would refrain from drinking liquor or using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, where the infant having performed it was held he was entitled to the $5,000. This proceeds upon the theory that the uncle made a proposition to the nephew and the nephew gave up certain rights which he had and adapted his conduct to the particular wishes of the uncle in that respect, and that those acts upon the part of the nephew were a sufficient consideration to support the promise. The court say (at p. 545): "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." The nephew had the right to do any one of the acts which the uncle requested him not to do. And while it was probably beneficial to him, taking a correct view of human life, to refrain from doing those acts, the fact remains that he waived those rights at the request of the uncle, and such waiver upon his part was by the contract a sufficient consideration for the $5,000. Under the above case, if the husband had agreed to deed the property to the wife in case she would adopt a certain line of conduct, or do certain things which she was not called upon to do under her marital duties, we can see a direct consideration for his promise. But here whether she gets the house and lot does not depend upon anything she may do or has done, but depends upon his own action and conduct.

Digitized by Google

It is in the nature of a penalty. She, of course, has an interest in the husband remaining sober and industrious, but it is not such an interest that she can enforce by contract with him under the penalty of forfeiture to be suffered in case of his default.

I, therefore, hold that there is no consideration for the deed or the delivery thereof, and that at the time of his death, the deed never having been delivered, the husband was the owner of the property and the plaintiff as his daughter inherited the same subject to the dower interest of the mother, the defendant. The plaintiff is, therefore, entitled to judgment for the relief demanded in the complaint.

Judgment for plaintiff.

Matter of the Estate of GEORGE A. HARDIN, Deceased.

(Surrogate's Court, Herkimer County, July, 1904.)

Statute of Distributions, Code Civil Procedure, § 2732 — Effect of subdivision 12, on subdivision 3.

The provisions of subdivision 3 of the Code of Civil Procedure, § 2732 — that, failing descendants of an intestate, parent, brother or sister, nephew or niece, the surviving widow is entitled to the whole surplus — have not been affected or impaired by the provisions of subdivision 12 of the section, declaring that representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate.

PROCEEDING to compel the administratrix to render and settle her account as such in the above estate.

E. A. Brown (C. D. Adams, of counsel), for petitioner.

Miller, Fincke & Brandegee, for administratrix.

DEVENDORF, S. George A. Hardin died intestate at Little Falls, N. Y., April 16, 1901, leaving a widow him surviving, who was subsequently appointed sole administratrix of the

Digitized by Google

goods, chattels, credits and effects of said deceased. He left no descendant or parent, brother or sister, nephew or niece. There were two uncles and two aunts of the deceased living at the time of his death, the petitioner herein being a sister of said intestate's mother.

The petitioner claims that as such maternal aunt she is entitled to share in said estate as representative and next of kin. Upon the return of the citation, counsel for the administratrix moves to dismiss the petition herein upon the ground that the petitioner is not a person interested in the estate within the scope of section 2727, Code Civil Procedure, and consequently the proceeding must fail and be dismissed accordingly.

The language of the Statute of Distributions applicable to this case as contained in subdivision 3 of section 2732 of the Code of Civil Procedure is as follows: "If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus."

It is urged by the petitioner herein that she becomes entitled to a part of the personal estate of the said deceased and is interested in the distribution through the provisions of subdivisions 2 and 12 of section 2732 of the Code. Especially so it is urged that, by the amendment of 1898 to said subdivision 12, the petitioner becomes entitled to a distributive share of the personal property of the estate. Prior to the amendment mentioned subdivision 12 read: "No representation shall be admitted among collaterals after brothers and sisters' children." As amended it reads: "Representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate."

I think this change only enlarged or extended the provisions of section 2732, so that, where there is representation, it shall extend further than, as formerly, to children of brothers and sisters, and shall be admitted among collaterals in the same manner as allowed by law in reference to real estate. I do not think that this amendment of 1898 to subdivision 12 in any way affects the explicit language contained in subdivision 3 of said section, which specifically

Digitized by Google

provides that where a deceased intestate leaves a widow and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus.

In Matter of Davenport, 67 App. Div. 194, Hirschberg, J., says: "I am inclined to the belief that it (the amendment) was designed to harmonize and unify the devolution of property in the two classes of estates with respect only to representation, and in that respect only among collaterals."

Had it been the intention of the Legislature to distribute personal estates among collaterals in the same manner, to the same persons and in the same proportions as real estate descends it would have been easy for it to provide apt language in the statute for that purpose. In the Davenport case the court held that subdivisions 5 and 10 of said section 2732 retain their full force and were not affected or limited by the amendments.

The petitioner is one of the next of kin to the intestate in her own right and not by representation. She inherits a share of the deceased's real estate as heir-at-law, and had there been no widow she would have been entitled to distribution in the personal estate as next of kin and not as a representative of any other relative. The said subdivision 12 has reference only to representation among collaterals which shall be admitted in the same manner as allowed by law in reference to real estate.

I do not think the amended subdivision could be made to apply in any way to this case. The interests of the widow are not affected by it and subdivision 3 of said section stands in full force, unaltered, unrepealed and unaffected in any manner whatever herein by the language of subdivision 12, as amended; and, therefore, Judge Hardin having died intestate owning personal property and leaving a widow and no descendant, parent, brother or sister, nephew or niece, the widow is entitled to take the whole of the personal estate after the payment of debts.

The proceeding, therefore, is dismissed with costs. The form of the decree, if not agreed upon by the attorneys, may be settled before the surrogate on three days' notice.

Proceeding dismissed.

Digitized by Google

THE PEOPLE ex rel. GEORGE H. LASHER, Relator, v. HUGH ADAIR, County Treasurer of Delaware County, and P. W. CULLINAN, State Commissioner of Excise, Respondents.

(County Court, Delaware County, July, 1904.)

Liquor Tax Law.

Where a town clerk files with the county treasurer, and with the State Department of Excise, a detailed certificate or statement of the result of an election as to local option — whose details have evidently been obtained by him from the returns filed with him by the town inspectors — the certificate or statement must be deemed presumptively correct, and, although the result of the vote has never been ascertained or determined by the town board, the result, as shown by the certificate, must be upheld, and, in accordance with it, the county treasurer must issue, or withhold, a liquor tax certificate.

PROCEEDINGS upon the return of a writ of certiorari granted by the county judge of Delaware county to review the action of Hugh Adair, county treasurer of said county, in refusing to issue to George H. Lasher, the relator, a liquor tax certificate.

Eugene E. Howe, for relator.

Wm. E. Schenck, for State Excise Department.

Chas. L. Ashley, for Middletown Anti-saloon League.

GRANT, J. This a proceeding under section 28 of the Liquor Tax Law to review the action of the county treasurer of Delaware county in refusing a liquor tax certificate to the relator.

The relator is a resident of the town of Middletown in said county and for many years has been the owner of a hotel in said town and engaged therein in the traffic in liquors pursuant to a liquor tax certificate duly issued to him.

At the general election on the 3d day of November, 1903, the four propositions mentioned in section 16 of the Liquor

Digitized by Google

Tax Law were submitted to the voters of said town, in the four election districts into which the town is divided; in three of the districts the propositions were canvassed by the election inspectors and a statement of the result filed with the town clerk; in one of the districts no canvass was made and all the ballots containing the propositions were placed in a sealed package and marked "void ballots."

On the 5th day of November, 1903, the justices of the peace and town clerk of said town met as a board of town canvassers; they did not canvass the excise propositions but adopted the following motion or resolution: "Motion made by Mr. Jackson that this board of canvassers omit to canvass in regard to the local option questions submitted November 3d 1903 viz. Nos. one, two, three and four, on the ground that this board doubts its right and holds that it has no jurisdiction to canvass the votes upon the said propositions."

After the passage of the above resolution the board of canvassers adjourned *sine die,* and did not thereafter reconvene or canvass the said proposition.

On the 9th day of November, 1903, the town clerk filed or caused to be filed with the county treasurer and State Excise Department the following certificate or statement:

"Certified Copy of the Statement of the Result of Vote on Local Option Questions.

"Canvass of the votes cast upon the questions submitted to the electors of the town of Middletown, in the County of Delaware State of New York, pursuant the provisions of section Sixteen of the Liquor Tax Law, at the Town Meeting held at the time of General Election in said town on November 3d. 1903.

"I. The whole number of affirmative votes which were cast for Local Option Question No. I submitted were 115

"The whole number of negative votes which were cast against Local Option Question No. I submitted were 339

"II. The whole number of affirmative votes which were cast for Local Option Question No. 2 submitted were 86

Digitized by Google

"The whole number of negative votes which were cast against Local Option Question No. 2 submitted were 316

"III. The whole number of affirmative votes which were cast for Local Option Question No. 3 submitted were 151

"The whole number of negative votes which were cast against Local Option Question No. 3 submitted were 277

"IV. The whole number of affirmative votes which were cast for Local Option Question No. 4 submitted were 241

"The whole number of negative votes which were cast for Local Option Question No. 4 submitted were. 297

"There were ———— ballots endorsed 'Objected to as marked for identification' counted and included in the foregoing statement of result.

"There were one hundred and seventy ballots indorsed rejected as 'void' not counted and included in the foregoing statement of result.

"We certify that the foregoing statement is correct in all respects.

"Dated Nov. 7th 1903.

"J. K. P. Jackson	Refused to canvass	Justices of the
"Will Hubbell	vote and cannot	Peace of the town
"Sol Mayes	thus certify	of Middletown, N. Y.

"Marshall H. Dean, Town Clerk of the Town of Middletown, N. Y.

"State of New York
County of Delaware } *ss.:*
Town of Middletown

"Middletown Town Clerk's Office:

"I, Marshall H. Dean, Town Clerk of the Town of Middletown aforesaid, do hereby certify that I have compared the foregoing copy of the statement and return of the votes cast on the questions submitted pursuant to the provisions of Section Sixteen of the Liquor Tax Law at the Town Meeting of the Town of Middletown held at the time of General

Digitized by Google

Election in said Town November 3d, 1903, and the result of said vote on said questions submitted, with the originals on file in this office, and that the same is a correct transcript thereof, and of the whole of said original statement, return and result.

"Dated November 7th 1903.

"MARSHALL H. DEAN, *Town Clerk.*"

It is claimed by the relator that the statement made and filed by the town clerk with the county treasurer and excise department was void and of no effect as it was made and filed without authority of law and is not such a certified statement of the result of the vote as is required by the Liquor Tax Law.

The relator also contends that the statement being void and without authority of law, the county treasurer should have ignored it and issued to him a liquor tax certificate.

The relator now asks this court to determine that the application for the liquor tax certificate was denied without good and valid reasons therefor, and that under the provisions of the Liquor Tax Law, such certificate should be issued to him and asks that an order be made commanding the county treasurer to issue the same.

The questions for determination upon the return of the writ are *first;* whether or not such application was denied without good and valid reasons therefor, and *second;* whether under the provisions of the Liquor Tax Law a certificate should be issued and an order made commanding the county treasurer to issue the same.

Section 16 of the Liquor Tax Law provides: "That a certified copy of the statement of the result of the vote upon each of such questions submitted, shall immediately after such submission thereof be filed by the town clerk or other officer with whom the returns of the town meetings are required to be filed, by the election law with the county treasurer of the county," etc.

No statement of the result of the vote upon the questions submitted was ever made by the town board, acting as a board of town canvassers, and no certified statement of the

Digitized by Google

result of the vote, upon the excise propositions, in said town, was ever made and filed, excepting the statement or certificate hereinbefore mentioned.

The questions involved in this case are to some extent novel, but so far as the issues presented by the return to the writ are concerned, several decisions have been made which, at least, throw some light upon the issues and furnish a guide for the determination of the case.

The case of People ex rel. Leonard v. Hamilton, 42 App. Div. 212, was an appeal from an order of the county judge of Monroe county, in a case involving questions similar to those involved in the case at bar. This case has been followed by the courts in this and adjoining departments upon applications of this character where the questions involved related to the sufficiency of the statement or certificate filed by town clerks, of the result of the vote upon excise propositions.

In that case the town clerk filed simply a statement of the vote of the town of Ogden in the county of Monroe, showing the vote upon the four propositions and upon the application of the relator refused to issue the same, upon the ground that the statement aforesaid had been filed with him, apprising him that a majority of the qualified electors of the town of Ogden had voted against the granting thereof.

A writ of certiorari was issued by the county judge, and upon the return of the writ it was held that the statement of the result filed by the town clerk was not a compliance with the statute, which required that a "Certified copy of the statement of the result of the vote," etc., should be filed, and it was ordered that the county treasurer issue to the relator a certificate, unless the town clerk within five days file with the county treasurer a certified copy of the statement of the result of the election, from which it shall appear that such liquor tax certificate cannot be lawfully granted, in which case the application shall be refused.

An appeal was taken to the Appellate Division of the Supreme Court, Fourth Department, and the foregoing decision was affirmed. Mr. Justice Spring, writing the opinion of the court in which all concurred, says: "The statement

Digitized by Google

made by the town clerk of the result of this town meeting unmistakably apprised the treasurer that at a town meeting held on the seventh day of March the majority of the votes cast on question 4 was decisively against the question submitted, giving the precise vote for and against the proposition. While the statement so made is not technically and strictly a 'certified copy' of the return of the town meeting, in literal detail, it serves the purpose of acquainting the treasurer of the result of the vote and is adequate justification for his action. If the return is truthful in the vital part, that is, if the statement of the result of the town meeting is correct, then it should be upheld. As was said in People ex rel. Hirsh v. Wood (148 N. Y. 147): 'The object of elections is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them.'

"The contention of counsel for the relator, that this statement should have all the verity of a certified copy to be admissible in evidence, is not a fair test of its import.

"The right to sell liquors depends upon the vote, not upon the statement. The statement is the means provided in the act to get the information of the result of the action of the electors to the officer who is to make effective their intent. Presumptively the statement is correct and you must be governed by it. * * * Irregularities in the statement will not be invoked to defeat the will of the electors."

This case was followed by Mr. Justice Forbes in the case of People ex rel. Smith v. Foster, 27 Misc. Rep. 567, where a similar statement was filed by the town clerk; it was also followed by Mr. Justice Werner, in the case of the People ex rel. Clint v. Hamilton, 27 Misc. Rep. 360, in a case where a defective statement had been filed by the town clerk.

In all of these cases the statements were defective and not in compliance with the requirements of law, but it was held the effect of the statements was to apprise the county treasurer of the result of the vote upon the excise propositions.

I see no reason why these decisions are not controlling

Digitized by Google

in the case at bar, so far as the effect of the statement is concerned.

In the case at bar the certificate is something more than a mere statement of the result; upon its face, it appears to be a detailed statement of all that is required by the Liquor Tax Law, but the criticism made by the relator is that the statement is false, in that it purports to be a statement of a result which was never ascertained or determined by the town board. It is apparently true that no result was ever ascertained and determined by the town board; the result was evidently obtained by the town clerk from the returns filed with him by the election inspectors of the town; upon this application it is unnecessary for me to determine which was the correct method because the statement filed, being in substantial compliance with the Liquor Tax Law, justified the county treasurer in refusing to issue a certificate.

Upon the second question it has been held that the test of the right to a liquor tax certificate depends upon the result of the vote.

In People ex rel. Leonard v. Hamilton, *supra,* it was held "that the test of the right to a liquor tax certificate, carrying with it the privilege of selling intoxicating liquors, does not rest with any officer, judicial or ministerial, but with the electors of the town. Their vote is to determine that question. * * * The act requires the town clerk to make a statement of the result of the vote to the county treasurer. This is not for the purpose of furnishing evidence for use in the courts; it is to advise the treasurer of the result of the vote. If the return made is false, the remedies for its correction are ample, as the courts are swift to undo any inadvertence or corrupt error which tends to override the will of the majority as expressed lawfully at an election. But if the return contains the requisite information enabling the treasurer to act, then that must be his guide."

In the case at bar the return shows that the county treasurer refused a liquor tax certificate to the relator upon the ground that the statement filed showed an apparent majority

Digitized by Google

for no license of fifty-six; this statement is not controverted, and the test as to the relator's right to a certificate must depend upon this result.

The application must, therefore, be denied, without cost to either party, and an order may be entered accordingly.

Application denied, without costs.

SUSAN ANN TRUESDELL, Appellant, *v.* JESSE WINNE, Respondent.

(County Court, Greene County, July, 1904.)

Justice's court — Duty of the justice to try the case.

That, in an action in justice's court, the defendant, by affidavits presented and read on the return of the summons, charged, and the justice denied that he, on the trial before him of a former action, said, in court, that he would not believe the defendant or his counsel under oath, affords the justice no right or reason to dismiss the action with costs against the plaintiff.

APPEAL from a judgment dismissing the action with thirty-five cents costs against the plaintiff. On the return of the summons the defendant presented affidavits alleging that the justice, while a former action was pending before him, stated that he would not believe the defendant or his counsel under oath, and the defendant asked that the action be dismissed upon that ground. The justice, at the time the motion was made, stated that he had not made the statement claimed to have been made by him in said affidavits. The justice, however, dismissed the action, and rendered judgment against the plaintiff for thirty-five cents costs, from which judgment this appeal is taken.

Baker & Patrie, for appellant.

D. H. Daley, for respondent.

TALLMADGE, J. There is no statute in this State that expressly disqualifies a justice of the peace from sitting as

Digitized by Google

such, for the reasons stated in the moving affidavits. Section 46 of the Code of Civil Procedure disqualifies a judge from sitting as such, or from taking any part in the decision of a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related to any party to the controversy within the sixth degree. The word "judge" as used in this section includes a justice of the peace. Code Civ. Pro., § 3343.

The object of this section is to prevent a judge from sitting in a cause where he might be prejudiced or biased for the reasons stated in the section. Where the grounds, which will operate as a disqualification of a judge, are expressly set out in a constitution or statute, such provisions are held to be exclusive, and no other causes than those set out will work a disqualification. Am. & Eng. Encyc. of Law, vol. 17, p. 740.

Section 46 does not expressly provide for a case like the one under consideration, and in the absence of an express statutory provision, prejudice or bias on the part of the judge, which is not based on interest, is not assignable as a ground for his disqualification. Yet our courts have been careful to keep unsullied their dignity and integrity, when conditions were such that criticism might be invoked on account of implied bias on the part of a judge. The reason for the adoption of this practice has been held to be, that "Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge." People ex rel Roe v. Suffolk Common Pleas, 18 Wend. 550; Darling v. Pierce, 15 Hun, 543; Oakley v. Aspinwall, 3 N. Y. 549.

If, when the affidavits were presented, the justice had acquiesced in the allegations contained in the affidavits of the moving party, or had remained silent and dismissed the action, or had refused to hear it, I am of the opinion that in such a case the court should not reverse a mere judgment of dismissal. The justice, in such a case, would be deemed to have taken the suggestion of the moving party

Digitized by Google

and to have refused to hear the case, the same as though he had done so of his own motion. But where the return shows that the justice stated that he did not make the statements alleged to have been made by him in the affidavits, he thus disclaims any bias on his part, and in such case he had no right to retire from the case or to dismiss the action. It is the duty of the court to proceed unless he is satisfied that he should not. Matter of Newcombe, 45 N. Y. St. Repr. 806.

The good faith, honesty and integrity of the court cannot be assailed by a party to an action in such a manner. The justice is not called upon to use in his own court answering affidavits, and where he states upon the record facts showing that he is not prejudiced or biased, such statements, for the purposes of that action, should be taken as true. Otherwise, a party to any action could oust a court of jurisdiction, by presenting an affidavit showing the justice to be prejudiced or biased in the case, and, even though the justice disclaimed such prejudice or bias, it would not avail. If the justice is corrupt a proceeding may be instituted against him to remove him from his office, or he may be proceeded against criminally.

In McDowell v. Van Deusen and Delamater, 12 Johns. 356, the plea of *puis darrein continuance* was interposed and overruled. The court say: "Admitting the truth of the matter set forth in it, it was not such as the defendant could avail himself of, to prevent the trial. It is a genearl principle, that a judge cannot be excepted to, or challenged, for corruption; but must be punished by indictment, or impeachment."

Again, the justice of the peace had no right to dismiss the action and enter judgment against the plaintiff for the costs of the action. If there was any warrant for the court to dismiss the action, even on his own motion, and even though he had agreed with the affidavits presented on behalf of the defendant, he had no authority to enter judgment for costs. The only authority to dismiss an action on account of interest or bias is found in section 46 of the Civil Code, and if it could be held that under that section a court was

Digitized by Google

authorized to dismiss an action when bias or prejudice was shown to exist, then that section should be taken into consideration upon entering judgment in the action.

Section 3075 of the Code of Civil Procedure expressly provides: "That where the justice is disqualified, for a reason specified in section 46 of this act, costs shall not be awarded to either party, but each party must pay his own costs."

While the amount involved in this action is small, yet I believe it involves a matter of right, and said justice having erred, to the prejudice of the plaintiff in the action, the judgment should be reversed, with costs, in favor of the appellant, and against the respondent.

Judgment reversed, with costs.

WILLIAM WRIGHT, Respondent, *v.* NAT W. SHEPHERD, as Commissioner of Highways of the Town of Wilmurt, Appellant.

(County Court, Herkimer County, July, 1904.)

Justice's court — Jurisdiction, when lost.

By the adjournment of an action, in justice's court, for more than eight days (made after joinder of issue and one adjournment by consent) against the defendant's objection, the justice loses jurisdiction which is not restored by the defendant's subsequent participation in the trial.

APPEAL from a judgment rendered December 4, 1904, on the verdict of a jury for seventy-three dollars and eighty-five cents recovery and costs against the appellant.

Charles B. Hane, for appellant.

James Coupe, for respondent.

DEVENDORF, J. This judgment cannot be sustained, because errors were committed in the court below which require a reversal. Among such errors is that of an adjourn-

Digitized by Google

ment granted by the justice, at plaintiff's request, contrary to the provisions of the Code.

The summons was returnable November fourteenth, at which time the parties appeared and issue was joined and the case by agreement postponed to November twenty-fifth following, at which time the parties again appeared; amended pleadings were filed by consent, and plaintiff asked for a further adjournment, also for a venire; defendant objected to both the adjournment and the drawing of a jury, his objections were overruled and the action adjourned by the justice on plaintiff's motion for more than eight days, namely, to December fourth. At the adjourned day the parties appeared, and the defendant moved to dismiss the action by reason of such illegal adjournment, the motion was denied, and the case proceeded to trial against the specific objection of the defendant. The adjournment from November twenty-fifth to December fourth, at plaintiff's request (defendant objecting), was illegal, and jurisdiction was lost. Code Civ. Pro., § 2960; Moody v. Becker, 70 N. Y. Supp. 543; Morris v. Hays, 14 App. Div. 8.

Jurisdiction was not subsequently conferred by defendant's appearance at the trial, after his motion made at the time to dismiss had been denied; having done all that he could to prevent an unauthorized adjournment, defendant was not bound to abandon the case. Baird v. Helfer, 42 N. Y. Supp. 484.

The judgment entered was erroneous, and hence must, for the above reasons, if no other, be reversed.

I think further errors were committed by the justice upon the trial, in rejecting evidence offered by the defendant, and in striking out certain evidence, but it is unnecessary to call attention to them specifically, as the illegal adjournment necessitates a reversal.

Judgment of reversal will enter herein accordingly.

Judgment reversed.

Digitized by Google

WILLIAM WRIGHT, Respondent, v. THE TOWN OF WILMURT, Appellant.

(County Court, Herkimer County, July, 1904.)

Highways — Power of town highway commissioner to create a liability — Necessity of audit.

No statute authorizes a town highway commissioner to create a liability, upon the part of his town, to a person he hired to cut brush along a town highway, and even if such a liability were created it would not become actionable until the claim had gone before the town auditors.

APPEAL from a judgment, rendered in a justice's court of Herkimer county, in favor of the plaintiff and against the appellant for $120.15 damages and costs.

C. B. Hane, for appellant.

James Coupe, for respondent.

DEVENDORF, J. The plaintiff brought this action in the court below to recover $105.60, contract price for labor and services rendered by him in cutting brush upon the highways in said town.

The evidence, as submitted by the plaintiff upon the trial of this case and as ascertained in the return, is not sufficient to sustain the judgment appealed from.

Giving the broadest scope possible to the plaintiff's case, he established nothing beyond the facts that the plaintiff had rendered services, pursuant to contract or agreement with the highway commissioner of said town, cutting brush along the highway therein, that he had not been paid for such services, and that the value of the contract price therefor amounted to $105.60.

The appellant attacks the judgment in this case upon several grounds of alleged error, but let us assume that all rulings herein were legal, and then determine whether the case can be sustained on the merits.

The proposition then would be whether a town is liable to pay for services, rendered for or pursuant to agreement with

Digitized by Google

a commissioner of highways, in cutting brush within and along the highway, and if so, whether an action can be maintained against the town therefor without presenting the claim for audit to the auditing board of the town. I think it is well settled that highway commissioners have no general power or authority to render a town liable for the performance of contracts entered into by them. People ex rel. Everett v. Board of Supervisors, 93 N. Y. 397. And that commissioners are in no sense agents of the town in entering into contracts in the performance of their official duties; they cannot bind the town in that regard unless that power is expressly conferred by statute. People ex rel. Bevins v. Supervisors, 82 Hun, 298; Lyth & Sons v. Town of Evans, 33 Misc. Rep. 221; People ex rel. Bowles v. Burrell, 14 id. 217.

Section 10 of the Highway Law, which provides for extraordinary repairs, authorizes the commissioner to create a debt against a town, or render a town liable thereunder, if acting strictly pursuant to and within the scope and powers conferred by said section, but not otherwise. People ex rel. Peterson v. Clark, 45 App. Div. 65; Lyth & Sons v. Town of Evans, 33 Misc. Rep. 221.

There are no allegations or proofs herein which bring the case within the provisions of said section 10, neither does section 182 of the Town Law authorize this action. That section does not empower commissioners to enter into any contract for or in behalf of their town, and its provisions authorize actions only where there is a liability; no rule of law is enacted thereby which creates a liability upon the part of the town where none formerly existed. Colby v. Town of Day, 75 App. Div. 211; Robinson v. Town of Fowler, 80 Hun, 101.

Without further reference to the authorities the conclusion is easily reached that the commissioner of highways by entering into an agreement for the cutting of brush within and along the highway, at a fixed price per rod, created no debt for the recovery of which an action could be maintained against the town.

But, even if a liability by contract were created, the claim

Digitized by Google

would have to go to the town auditors before action or proceedings could be maintained. 33 Misc. Rep. 221; 43 App. Div. 22; 82 Hun, 302; 114 N. Y. 324; 93 id. 403; 84 App. Div. 83.

If the auditors failed in their duty, remedy by mandamus or otherwise could be invoked.

As the evidence in this case does not establish a liability on the part of the town to pay for the cutting of brush along the highways, the judgment recovered in the court below must necessarily be reversed.

My attention has been called to many rulings of the court upon the trial, the appellant contending that evidence was illegally received against its objection, and that evidence offered by it was also illegally excluded.

Without mentioning the instances in particular, I agree with the appellant in that regard, that evidence offered by the appellant was excluded in the case illegally, and were there no other reasons, I believe such erroneous rulings would require a reversal of the judgment.

I am content, however, to say, that the evidence in the case falls far short of establishing a valid claim against the town of Wilmurt, or establishing a right of action herein against it, and hence the judgment appealed from must be reversed, and judgment accordingly will enter.

Judgment reversed.

MARGARET COMMINS, Respondent, *v.* JOHN W. PERRY, Appellant.

(County Court, Onondaga County, July, 1904.)

Oral agreement for the sale of land — Statute of Frauds — Deed — What constitutes delivery.

Where an oral agreement for the sale of land is not performed in the detail of payment by the vendee of the purchase price, the agreement is not performed and executed and therefore is void under the Statute of Frauds.

To constitute delivery of a deed there must be something more than a physical change of possession. There must be an intention to part with the title also "involving acceptance."

Digitized by Google

Misc.] County Court, Onondaga County, July, 1904.

APPEAL from a judgment of the Municipal Court of the city of Syracuse in favor of the plaintiff for $800 damages and $48.95 costs.

The trial was had before one of the judges of that court without a jury.

Hancock, Hogan & Devine, for appellant.

Burden & Shanahan, for respondent.

Ross, J. On and prior to April 23, 1904, verbal negotiations were had relative to the sale by the plaintiff to the defendant of an improved lot situate in Fayette street in the city of Syracuse. The transactions were carried on on behalf of the plaintiff by one Joseph H. Saunders, a real estate broker, and William J. Commins, her husband.

Mr. Eugene M. White, an attorney-at-law, having an office in the city of Syracuse, was authorized by, and acted as attorney for, the defendant. The price agreed upon was $2,800. The defendant agreed to assume a mortgage upon the property of $2,000, and to pay the balance in cash. This action is brought to recover that amount.

On April 23, 1904, Mr. White, to whom an abstract of the title of the property had been delivered, informed his client that the title was satisfactory. On the twenty-third day of April the following matters, in regard to the transaction in question, occurred. About eleven o'clock in the forenoon the plaintiff delivered to Mr. White a deed properly executed of the premises. About four P. M. the keys to the building upon the premises were handed to Mr. White. During the afternoon the defendant placed his check for $1,500 in the hands of his attorney, Mr. White. The check was upon a savings bank and was accompanied with the savings bank-book, which was necessary to enable the holder to obtain the money. Mr. White was, in substance, instructed by the defendant to pay the plaintiff $800, less any taxes that might be paid, and to pay to the holder of the mortgage $700, to apply upon the same. The only matter which, at that time, had not been satisfactorily arranged was the question of possession. There was a dispute

Digitized by Google

as to whether the occupants of the premises had moved, and there was a dispute upon the trial as to the time they actually did move out. The contention of the plaintiff as to the negotiations relative to possession and the actual time the premises were vacated must be assumed upon this appeal to be correct. In other words, so far as the question of possession is concerned, it is assumed that the plaintiff performed her agreement.

After the check for $1,500 was placed in Mr. White's hands, and before five-thirty P. M., Mr. William J. Commins called upon Mr. White, who showed him the check of $1,500; Mr. Commins took the check and read it, and returned it to Mr. White. There was a conversation to the effect that the bank was closed for the day, and Mr. White stated that he would give Mr. Commins his individual check for $800, and Mr. White then stated as follows, relative to the controversy as to whether the people were moving out: "I am told that they are moving out, but I think I will not give you that check until I am satisfied that they are moving out," but said, "If you and Mr. Saunders will come into my office at eight o'clock to-night — in the meantime I will go down and see — I will give you a check for $800. He said, 'all right, I will be here at eight o'clock.'"

About five-thirty o'clock the defendant came to Mr. White's office and said, in substance, that "Those people are not moving. The deal is off, and I want my check," which, after some conversation, was returned, together with the bank-book, by Mr. White to the defendant.

The claim of the defendant upon this appeal is, in brief, that there was no agreement relative to the sale of the real property in question to satisfy the requirements of the Statute of Frauds, or the provisions of the Real Property Law. And the contention of the plaintiff is that the transaction was an executed one to which the Statute of Frauds is not applicable within the principle of the case of Thomas v. Dickinson, 12 N. Y. 364. In the case cited the plaintiff and defendant entered into a verbal agreement by which the plaintiff was to transfer to the defendant his interest in two lots of land possessed by him under contracts for their

Digitized by Google

purchase, and the defendant was to convey to the plaintiff in fee a parcel of about eighteen acres of land, and was to pay a sum of money and transfer a debt. The plaintiff transferred the contracts and surrendered the possession of the lots of land, and the defendant conveyed to the plaintiff the eighteen acres of land; the money was not paid to the plaintiff, nor the assignment of the debt executed. As stated by Johnson, J.: "Thus the whole contract, save in a single particular, was performed by the parties to it, notwithstanding its invalidity; all that remained to be done to complete its performance was that the defendant should make the transfer of the Campbell debt. The plaintiff had fully performed. * * * It thereby ceased to be a contract for the sale of lands or an interest in lands and became a mere agreement to pay for lands conveyed. As such it was not within the statute of frauds."

Suppose that in the case under consideration the defendant had taken possession of the premises, and had paid a part of the purchase price, and this action was brought to recover the balance, the case cited would be in point. The situation seems to me simple. The deal was never consummated by the payment of the purchase price. The promise of Mr. White to give his personal check is beside the case. There was no contract between Mr. Commins and Mr. White relative to the check of the latter of $800; but assume that there was such an oral contract, it was none the less an agreement relative to the sale of lands because it related only to a part of the transaction. Suppose that Mr. Commins had been the one who desired to terminate the transaction, and had declined when he left Mr. White's office at five-thirty to proceed further, can there be any question about his right to have so done? The trouble, as it seems to me, with the position of the plaintiff is, that it rests upon the assumption that Mr. White was the agent of the plaintiff. This is at variance with the facts. Assuming with the court below that Mr. White had authority to accept the deed for the defendant, he had no authority, however, to accept payment for the plaintiff. If it be claimed that it was the defendant's own wrong that the

Digitized by Google

money was not paid, this is not an answer to a defense of the Statute of Frauds. Cagger v. Lansing, 43 N. Y. 550, 553. The learned counsel for the respondent suggests the effect upon the transaction if Mr. White had deposited the $1,500 belonging to the defendant and issued his own checks of $700 and $800 to the mortgagee and the vendee respectively. I cannot see what possible effect such an occurrence would have if it stopped at that point. In other words, any diversion of the money paid to an agent by his principal, unacquiesced in by the third party to whom it was to be paid, cannot change the rights of the third party.

The claim that the grantor was divested of her title the moment the deed was delivered to Mr. White is unsound. To constitute delivery of a deed there must be something more than a physical change of possession. There must be an intention to part with the title also "involving acceptance." The plaintiff had no intention to part with the title until she received the purchase price. Brackett v. Barney, 28 N. Y. 340, 341; Roosevelt v. Carow, 6 Barb. 195.

Judgment reversed, with costs.

JOHN ZEISER, Plaintiff, *v.* MARK COHN, Individually and as Executor of THERESA COHN, Deceased, Defendant.

(Supreme Court, Albany Special Term, July, 1904.)

Action to set aside fraudulent conveyances — When the complaint therein does not also set forth a cause of action on contract — Such a joinder would be improper — When it will not be amended to conform to the proof — Prayer for relief considered in determining the character of the action — Motion for nonsuit — Questions arising thereon where decision is reserved until after verdict.

The complaint in an action brought by a judgment creditor after the return of an execution unsatisfied, set forth alleged fraudulent conveyances of the judgment debtor's real and personal property and further alleged that the grantee, in consideration of such conveyances, had agreed to pay the indebtedness of the judgment debtor to the plaintiff. Judgment was demanded that the conveyances be set aside as fraudulent, that the real estate

Digitized by Google

included in the conveyances be declared subject to the lien of the plaintiff's judgment, that the proceeds of certain real property which was included in the conveyances and which had been sold by the grantee be applied to the payment of the plaintiff's judgment and that a receiver of the judgment debtor's property be appointed.

The notice of lis pendens stated that the action was "in the nature of a creditor's bill to set aside and declare null and void as in fraud of creditors, and to establish a lien, upon certain premises," and in opening the case, the counsel for the plaintiff characterized the transactions as fraudulent and as intended to hinder and defraud creditors.

Held that the only cause of action alleged in the complaint was one to set aside the alleged fraudulent conveyances.

That the allegations concerning the grantee's agreement to pay the debts of the judgment debtor were simply allegations of steps in or parts of the alleged fraudulent scheme, and did not constitute a separate cause of action on contract.

That the two causes of action in question could not properly be united in the same complaint.

That as the evidence offered by the plaintiff to prove a cause of action on contract had been received over the objection of the defendant, the plaintiff was not entitled to have the complaint amended to conform to the proof.

That as such an amendment would change the cause of action from tort to contract the court would have no power to grant it.

While ordinarily, a demand for relief is not conclusive as to the character of the action, yet where a complaint sets forth facts that may support equally an action at law or in equity, the character of the action is determined by the relief demanded.

Where the decision of a motion for a non-suit is reserved until after the verdict, all questions are before the court which could be raised upon a motion to set aside the verdict except such as relate to inferences to be drawn from the evidence or in respect to the weight thereof.

MOTION for a nonsuit; on which the decision was reserved until after verdict pursuant to section 1187 of the Code of Civil Procedure.

Fletcher W. Battershall (J. Newton Fiero, of counsel), for plaintiff.

Mark Cohn personally, with him (James J. Farren and John A. Delehanty, of counsel), for defendant.

Digitized by Google

HERRICK, J. Upon a motion for a nonsuit where a decision is reserved until after the verdict, all questions are before the court that could be raised upon a motion to set the verdict aside, except as to inferences to be drawn from, or the weight of evidence.

After a review of the pleadings and of the proceedings upon this trial, I am satisfied that the court committed an error in permitting the plaintiff to prosecute the action as one upon contract, instead of an action in the nature of a creditor's bill to set aside conveyances alleged to have been executed to defraud creditors.

The complaint in this action in the first paragraph thereof sets forth the recovery of a judgment on or about the 23d of October, 1902, in favor of the plaintiff and against one Jacob Cohn for the sum of $8,325.77. The second and third paragraphs state the issuing of an execution upon said judgment to the proper county, and its return unsatisfied, and that there is still due upon the judgment to the plaintiff the sum of $8,325.77.

In the fourth it is alleged, that after the indebtedness upon which said judgment was based was contracted, but previous to the recovery of said judgment, said Jacob Cohn was the owner of certain real estate of the approximate value of $125,000, and was also the owner and in possession of certain goods, wares, merchandise, store fixtures and accounts receivable of the approximate value of $25,000. "That said lands, goods, wares, merchandise and accounts receivable were of a value sufficient to satisfy said judgment, and out of which the same might have been satisfied and collected on execution but for the bill of sale and conveyance, and practices and contrivances of the defendant Jacob Cohn, hereinafter particularly described."

The fifth alleges that after the indebtedness upon which the judgment was based was contracted, but previous to the recovery of said judgment, and on the 2d day of June, 1897, the said Jacob Cohn transferred and assigned to Theresa Cohn, his mother, all the goods, wares, merchandise, store fixtures and accounts before mentioned by a bill of sale. "That the consideration expressed in said bill of sale was

Digitized by Google

the sum of $1, an alleged indebtedness of said Jacob Cohn to said Theresa Cohn, and her agreement of even date. That the said agreement by Theresa Cohn, as plaintiff is informed and believes, was an agreement by her to pay the debts of said Jacob Cohn then due and thereafter to become due."

The sixth alleges that after the indebtedness upon which said judgment was based was contracted, but previous to the recovery of said judgment, Jacob Cohn, by conveyance dated the 2d day of June, 1897, granted and conveyed to Theresa Cohn, his mother, all the real estate owned by said Jacob Cohn, and upon information and belief that the consideration of said conveyance was the sum of one dollar, and a collateral agreement of even date by which Theresa Cohn in consideration of said transfer agreed to pay the debts of Jacob Cohn then due and thereafter to become due.

The seventh alleges "That by the aforesaid collateral agreement of Theresa Cohn, made in consideration of said conveyance and bill of sale, she agreed to pay the indebtedness of said Jacob Cohn to this plaintiff upon which said indebtedness the judgment aforesaid was based, which she failed and neglected to do."

The eighth alleges that said bill of sale of goods, wares and merchandise and the conveyance of the lands of Jacob Cohn, were made by said Jacob Cohn and accepted by Theresa Cohn, "with intent to delay, hinder and defraud creditors of said Jacob Cohn, including this plaintiff, and that the same was not accompanied by an immediate and continued change of possession of the property, and that ever since the same was executed and delivered the said property, or other property bought with the avails thereof, has remained in the actual possession and under the control of the said defendant Jacob Cohn, who has retained possession and control thereof, under the false and fraudulent pretense that he was the agent of said Theresa Cohn, and her successor in interest."

The ninth alleges that the alleged indebtedness of Jacob Cohn to Theresa Cohn set forth in the bill of sale and pretended to be part of the consideration for the conveyance of the real property was fictitious. "And that in fact no such

Digitized by Google

indebtedness existed. That the same was therein inserted and claimed for the sole purpose of enabling Jacob Cohn to distribute the proceeds of the goods passed under said transfers, and the lands transferred by said conveyance, among the friends of said Jacob Cohn, and to keep possession and control thereof himself."

The tenth alleges the death of Theresa Cohn on the 25th day of July, 1900. That she left a last will and testament whereby she left all her property, real and personal, to her son, the defendant Mark Cohn. Also named said Mark Cohn as the sole executor of her last will and testament. That said will was admitted to probate, and the defendant, Mark Cohn, duly qualified as said executor, and is now acting as such. "That the said Mark Cohn was aware of the conditions of and the consideration for the aforesaid bill of sale and conveyance, and took the property with full knowledge of all the facts hereinbefore set forth relative thereto."

The eleventh alleges that prior to the recovery of the judgment, but after the indebtedness upon which it was founded was contracted, Mark Cohn sold and conveyed a portion of the lands heretofore conveyed by Jacob Cohn to Theresa Cohn for the sum of $65,000, which said sum the plaintiff alleges is now in his possession and under his control.

The twelfth alleges that the bill of sale and the conveyance aforesaid created and do create an incumbrance upon all the property, real and personal, of the defendant, Jacob Cohn, which prevents the plaintiff from selling the same under execution and from reaching and taking said lands, goods and chattel and choses in action, or the proceeds of such portions of the real and personal estate as may have been sold and turned into money by the defendant Mark Cohn, individually and as executor of the last will and testament of Theresa Cohn, and from realizing therefrom the amount of said judgment.

The thirteenth alleges that the plaintiff has demanded of Mark Cohn individually and as executor of the last will and testament of Theresa Cohn the payment of said judgment

Digitized by Google

against Jacob Cohn, with interest, out of the property of Theresa Cohn, deceased, conveyed to her by the defendant Jacob Cohn, and that Mark Cohn refuses and neglects to pay it.

The plaintiff then demands judgment against the defendant "that the said assignment and conveyance be set aside and declared fraudulent, null and void, and of no virtue, force or effect as against this plaintiff; that the said parcels of real estate be declared to be subject to the lien of said judgment of this plaintiff, together with the personal property assigned as aforesaid, and that the same be sold under the judgment of this court in this action. That said lien attach to the proceeds of such real estate in the hands of the defendant Mark Cohn, and that the proceeds of such sale or other moneys or proceeds in the hands of said defendant, Mark Cohn, be applied to the payment of defendant's said judgment. That the defendant Mark Cohn be adjudged to have in his hands funds and property which are applicable to the payment of this judgment, and that he be directed to pay over the same to this plaintiff or to a receiver of the property of Jacob Cohn to apply thereon. That for the said purpose and to carry into effect the decree of this court a receiver of all the property and effects of said Jacob Cohn be appointed. That the said receiver pay out of the proceeds of said property the judgment aforesaid, together with the costs and expenses of this action, and hold the balance subject to the further order of this court. That the defendants and each of them be in the meantime enjoined and restrained from disposing of any portion of said property, or paying away any of the proceeds thereof, or in anywise interfering therewith, and for such other and further relief as to this court may seem just and equitable."

At the time of the commencement of the action the plaintiff filed a notice of pendency thereof in the Albany county clerk's office, stating as follows: "Notice is hereby given that action has been commenced and is now pending in this court upon the complaint of the above-named plaintiff against the above-named defendants, said action being in the nature of a creditor's bill to set aside and declare null and void as in

Digitized by Google

fraud of creditors, and to establish a lien upon certain premises hereinafter more particularly described, which said premises, among others, were heretofore and on or about the 2d day of June, 1897, conveyed by Jacob Cohn to Theresa Cohn by deed, etc. * * * and to charge said real estate with a judgment heretofore recovered by John Zeiser against Jacob Cohn in the Supreme Court for $8,325.77, with interest from the 23d day of October, 1902, with costs."

In opening the case the counsel for the plaintiff characterized the transaction as fraudulent and committed for the purpose of hindering and defrauding the creditors of Jacob Cohn.

Upon the trial the plaintiff asked the defendant to produce the written agreement entered into between Jacob Cohn and Theresa Cohn at the time of the conveyance to her of the real estate and personal property mentioned in the complaint. The defendant thereupon produced a written agreement executed by said parties, which, however, did not contain the name of the plaintiff, John Zeiser, as one of the creditors whom Theresa Cohn agreed to pay. The plaintiff then proceeded to give evidence to the effect that the name of John Zeiser was in the original written agreement made between Jacob Cohn and Theresa Cohn. The defendant objected to any evidence of the agreement, or any evidence that the name of the plaintiff, John Zeiser, was in the agreement between Jacob Cohn and Theresa Cohn upon the ground that such evidence was not material or relevant to the issue as to whether the conveyance by Jacob Cohn to Theresa Cohn was fraudulent and void as to creditors. In response to that objection the plaintiff's counsel claimed that the action was twofold; that it was to set aside those conveyances as fraudulent and void, and to recover upon the collateral or accompanying contract entered into by Mrs. Cohn.

The court stated that if the plaintiff's counsel claimed there were two causes of action stated in the complaint, that he must elect which cause he would pursue or stand upon; plaintiff's counsel objected and excepted to such ruling and elected to proceed upon the contract, and furthermore stated that in the event of the jury finding a verdict in behalf of

Digitized by Google

the plaintiff upon the contract, that then he should ask the court to make a decree charging the real estate and its proceeds in the hands of the executor or in the hands of the legatee, the defendant Mark Cohn, with the payment of the judgment.

The only evidence of the indebtedness of Jacob Cohn to the plaintiff offered upon the trial was the judgment-roll in the case of the plaintiff, John Zeiser, against Jacob Cohn, to the reception of which the defendant Mark Cohn, objected and excepted.

Evidence was given by the plaintiff to the effect that the name of the plaintiff, John Zeiser, as one of the creditors of Jacob Cohn, whom Theresa Cohn agreed to pay, was in the written agreement executed between Jacob Cohn and Theresa Cohn at the time of the making of the conveyance of the real and personal property by Jacob to Theresa Cohn. This evidence was received over the defendant's objection and exception.

At the close of the plaintiff's evidence the defendant moved for a dismissal of the complaint as against the defendants Jacob Cohn and Mark Cohn individually, upon the ground that the plaintiff had elected to proceed upon the contract against Mark Cohn as executor of Theresa Cohn, deceased, and for a nonsuit upon the cause of action against Mark Cohn as executor, upon the ground that the evidence affirmatively shows that within a few days after the transfer in question the plaintiff had knowledge of the existence of the contract between Theresa Cohn and Jacob Cohn, assuming to pay the indebtedness in question, and that after such notice he elected to pursue his remedy against the defendant Jacob Cohn, and to recover judgment in the action and, therefore, cannot recover against Theresa Cohn or her representatives, and also upon the ground that the cause of action upon which the plaintiff now seeks to recover is not alleged in the complaint.

The court granted the motion to dismiss the complaint as to the defendant Jacob Cohn, but denied the motions for a dismissal of the complaint and for a nonsuit as to the defendant Mark Cohn, individually and as executor.

Digitized by Google

At the close of all the evidence the defendant, Mark Cohn, renewed his motion for a nonsuit. The court reserved its decision of the said motion for a nonsuit, under the provisions of section 887 of the Code of Civil Procedure, and submitted to the jury the following question: "Did the agreement signed by Theresa Cohn, at the time of the receiving of the bill of sale and deed from Jacob Cohn, as originally made, contain the name of John Zeiser in the list of Jacob Cohn's creditors to be paid by her?" To that question the jury answered "Yes."

The complaint sets forth a creditor's action to set aside conveyances made in fraud of creditors.

The different steps in the transaction are described as fraudulent.

The facts set forth, which it is now claimed are sufficient to constitute a cause of action upon contract, are simply steps in, or parts of, the alleged fraudulent scheme by which the creditors of Jacob Cohn were to be hindered, delayed and defrauded, and are not asserted in the complaint as a distinct and separate cause of action. And, "It should not be held that a complaint unites two or more causes of action without separately stating and numbering the same when it is necessary to go into an elaborate argument for the purpose of showing that it is possible to prove more than one cause of action under the complaint as stated." People v. Buell, 85 App. Div. 141.

Here the complaint definitely and certainly sets up a cause of action in the nature of a creditor's bill to set aside conveyances. The plaintiff characterized the action as such, and the relief demanded is appropriate to such an action, and it was, therefore, unnecessary for the defendant to move to have the complaint made more definite and certain by amendment.

The *lis pendens* characterizes the action as being in the nature of a creditor's bill to set aside conveyances as in fraud of creditors. The prayer for relief in the complaint is appropriate to a creditor's action, but not to an action upon contract, or one against an executor to enforce a contract of his testator.

Digitized by Google

While ordinarily the demand for relief is not conclusive as to the character of the action, yet when a complaint sets forth facts that may support equally an action at law or in equity, the character of the action is determined by the relief demanded. O'Brien v. Fitzgerald, 143 N. Y. 377.

Pleadings are for the purpose of informing the parties and the court of the claim made, and the issues to be passed upon.

They are not to be so drawn as to mislead. And it will not be assumed that a pleader intends to conceal one cause of action in the bowels of a complaint for another.

Neither will it be assumed that a pleader intends to join inconsistent causes of action.

In this case, if the contention of the plaintiff is correct, the complaint sets forth inconsistent causes of action, one founded upon fraud, and the other upon contract, each requiring a different form of relief. In the one he charges the transaction as fraudulent and asks relief because of the fraud; in the other he seeks to enforce as a contract a part of the same fraudulent transactions.

Causes of action requiring different forms of judgment and different forms of final process for their enforcement are inconsistent and cannot be united with each other. Perkins v. Slocum, 82 Hun, 366.

Causes of action upon tort and upon contract, although they arise out of the same transaction, cannot be united. Raynor v. Brennan, 40 Hun, 60; McClure v. Wilson, 13 App. Div. 274; Keep v. Kaufman, 56 N. Y. 332.

In the absence then of any formal statement in the complaint itself that the plaintiff intended to assert two or more causes of action, and when if we attempt to separate the matters alleged in the complaint into more than one cause of action, such causes of action will be inconsistent with each other, but where all of such facts are part of a single transaction, and together constitute a cause of action, and that cause of action is consistent with the relief demanded, then I think we must hold that the complaint sets forth only a single cause of action, even although some of the details might of themselves, if separately stated as such, constitute a complete cause of action.

Digitized by Google

In this case the complaint sets forth a cause of action founded on fraud, in the nature of a creditor's bill, and the relief demanded is appropriate to such a cause of action, the plaintiff himself characterized it as such, the defendants were justified in so considering it and the court must so hold it.

And the trial court should not have allowed any other issue to be tried than that tendered by the complaint.

"The character of the action was determined by the complaint. Its allegations state a cause of action *ex delicto*, and it was not competent at the trial to convert it into one *ex contractu*." Neudecker v. Kohlberg, 81 N. Y. 296.

"Pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary." Southwick v. First National Bank, 84 N. Y. 420–429.

"However liberal the construction, which the Code of Procedure permits to be given to the pleadings, in the interest of substantial justice, the rule, that a party, who comes into court with one cause of action, cannot recover on another and different one, is unchanged." Hatch v. Leonard, 165 N. Y. 435–443; Reed v. McConnell, 13 id. 425–434.

Where the complaint alleges facts showing a cause of action in tort, the plaintiff cannot recover by proving upon the trial a cause of action on contract. Degraw v. Elmore, 50 N. Y. 1.

"Where fraud is alleged as the basis of the action it must be proved. The law will not permit a recovery by proof of a right of action upon contract or of some other character, and this though facts may be stated or may appear which in proper form might sustain such an action." Truesdell v. Bourke, 145 N. Y. 612.

A statement of the rule and a summary of the decisions sustaining it are given in the dissenting opinion of Martin, J., in the case of Cassidy v. Uhlmann, 170 N. Y. 537.

Digitized by Google

While this statement is from a dissenting opinion, I think it contains a correct statement of the rule to be drawn from the different cases in the Court of Appeals, that is to say: "Where a case is based on fraud, the fraud must be proved, and no relief can be given on any different ground. De graw v. Elmore, 50 N. Y. 1; Ross v. Mather, 51 id. 108; Burnham v. Walkup, 54 id. 656; Dudley v. Scranton, 57 id. 424; Barnes v. Quigley, 59 id. 265; McMichael v. Kilmer, 76 id. 36; Salisbury v. Howe, 87 id. 128; Truesdell v. Bourke, 145 id. 612. In the Ross case it was held that in an action where fraud is the basis of the complaint, a recovery cannot be had for a breach of contract. The Burnham case was decided upon the authority of the Ross case, and involved the same question. The Dudley case holds that a cause of action based upon fraud, in the execution of a contract, is distinct from that founded on a mistake merely, and it is not competent upon the trial to make a substitution of one for the other. In Barnes v. Quigley it was decided that where the gravamen of an action is fraud, the court cannot change its form and allow a recovery as in contract, although facts may be stated in the complaint by way of inducement which might sustain such an action. In the McMichael case it was held that where a complaint is for fraud the action cannot be maintained on the ground of mutual mistake. Salisbury v. Howe was to the effect that when the gravamen of an action as set forth in the complaint is fraud, and the action is tried upon that theory without objection or exception, and the judgment is adverse to the plaintiff, the question whether the complaint stated facts sufficient to constitute a cause of action on contract, and whether there was evidence sufficient on the trial to sustain such cause of action, cannot be considered on appeal to this court. In the Truesdell case this court again asserted that where fraud is alleged as the basis of an action it must be proved, and that a recovery may not be had on proof of a right of action on contract or of some other character, although facts are proved which, in a proper form of action, would justify a recovery."

In an action to recover back the purchase money paid

Digitized by Google

upon a contract for the sale of certain stock by defendant to the plaintiff on the ground of fraud and a subsequent rescission of the contract, the agreement was for the sale of fifty shares for $5,000. The defendant delivered twenty-five shares. No fraud was proved on the trial, and defendant moved for a nonsuit. The court held that the action could not be sustained as one of fraud but that as it appeared that the defendant had only delivered twenty-five shares while the agreement was for fifty, plaintiff could recover damages for breach of the contract. Upon appeal to the Court of Appeals, this ruling was held error. "That the action, if one *ex delicto,* could not be changed to one *ex contractu.*" Matthews v. Cady, 61 N. Y. 651.

At the close of the plaintiff's case, and after the defendant's motion for a nonsuit, and while it was being argued, the plaintiff's counsel moved "to conform the pleadings to the proof on the part of the plaintiff." To this the defendant objected, and the court took the motion under consideration.

The evidence to which it was asked the pleadings be made to conform, having been received over the defendant's objection and exception, and the defendant also objecting to the proposed amendment, and inasmuch as it would change the cause of action from one to set aside conveyances as fraudulent as against creditors, to a cause of action upon contract, or one to enforce a vendor's lien, it must be denied.

Amendments to pleadings upon trial that set up a new cause of action, or substitute one cause of action for another, cannot be made when the evidence to which the amended pleading is to conform has been received against the objection of the other party, and such party also objects to the amendment. Rutty v. Consolidated Fruit Jar Co., 52 Hun, 492; Shaw v. Bryant, 65 id. 57; Smith v. Smith, 4 App. Div. 227; Freeman v. Grant, 132 N. Y. 22.

A number of other questions have been strongly argued before me, but in view of the above conclusions it is unnecessary to consider them.

For the above reasons and because the evidence upon the trial was insufficient to sustain a cause of action to set aside

Digitized by Google

the conveyances set forth in the complaint as being made in fraud of creditors, and because the cause or causes of action upon which the plaintiff at the close of the evidence claimed to be entitled to recover were not set forth in the complaint, the motion for a nonsuit must be, and hereby is, granted.

Motion granted.

THE PEOPLE EX REL. CHARLES HAVERLY, Relator, *v.* JACOB L. HANES et al., Defendants.

(Supreme Court, Albany Trial Term, July, 1904.)

Elections — Inspectors of.

In determining what ballots shall be counted for or against any candidate — or wholly rejected — as well as any question voted on, inspectors of election act judicially and cannot be required by a common-law mandamus to decide in a particular manner.

THIS is an alternative writ of mandamus directed to the board of election inspectors of the second election district of the town of Westerlo, N. Y., and the board of canvassers of said town, to which proceeding the State Commissioner of Excise is also made a party under the provisions of the Liquor Tax Law.

At the town meeting held in the said town of Westerlo on November 3, 1903, the four local option questions as provided by section 16 of the Liquor Tax Law were submitted to the electors of said town. The result of the election as canvassed and declared by the town canvassers showed an equal number of votes for and against the fourth question so voted on as aforesaid, relating to the traffic of liquors in connection with the business of keeping a hotel, and under the provisions of the Liquor Tax Law such result effected the prohibition of such traffic in said town in connection with the hotel business.

The inspectors of election in the second district of said town rejected as void four ballots, one of which it is claimed by the relator should have been counted in favor of the fourth local option question under consideration. The in-

Digitized by Google

spectors also counted against said question a number of ballots which the relator claims were void or had been marked for identification, none of which, however, were protested or objected to by any person at the time of counting or canvassing the same.

All these ballots, except the four which were rejected by the inspectors as void, were replaced in the box from which they were taken, as required by the Election Law. But the defendants assert that said box has been tampered with and that the ballots complained of by the relator are not now in the same condition in which they were when they were counted and canvassed by the inspectors, and considerable evidence was taken on the trial bearing on this question.

The term of office of all of the election inspectors expired in December, 1903, and only one of the old board has been reappointed and is now in office. There has also been a change in the town board of canvassers.

Application for a writ of mandamus herein was not made within twenty days after the election, as provided by section 114 of the Election Law.

Frost, Daring & Warner, for relator.

William G. Van Loon, W. L. Thornton and Peter A. Delaney, for defendants.

Cochrane, J. The relator seeks by this proceeding to require the board of election inspectors to recount and recanvass ballots heretofore counted and canvassed by them, and on such recount to reject ballots heretofore counted by them and to count ballots heretofore rejected by them as void.

Where the terms of office of the inspectors have expired, as in this case, they cannot independently of the Election Law be compelled by mandamus to reconvene and recanvass the ballots. People ex rel. Gaige v. Reardon, 49 Hun, 425; People ex rel. Bailey v. Supervisors of Greene, 12 Barb. 217; People ex rel. Stevens v. Hayt, 66 N. Y. 606; People ex rel. Smith v. Schiellein, 95 id. 133.

In People ex rel. Gaige v. Reardon, 49 Hun, 425, 432, Follett, J., said: "I concur in the result, upon the sole

Digitized by Google

ground that the terms of office of the inspectors having expired, they cannot be compelled by *mandamus* to reconvene and recanvass the ballots. (The Secretary v. McGarrahan, 9 Wall. 298; United States v. Boutwell, 17 id. 604; State v. Elkinton, 30 N. J. L. 335.) The inspectors who were elected to succeed the defendants are without power to recanvass the ballots. (Hadley v. Mayor, 33 N. Y. 603.) A *mandamus* would be unavailing. A remedy for such cases should be provided by statute."

I do not find any authority or judicial utterance at variance with the above authorities. The cases cited by the relator are not in point. They merely hold that notwithstanding the provisions of the Election Law the court still has common-law jurisdiction in election cases which has not been abridged or limited by the provisions of the statute.

Section 114 of the Election Law provides for a recount of votes in certain cases by mandamus and it also provides that "Boards of inspectors of election districts, and boards of canvassers, shall continue in office for the purpose of such proceedings." By this statutory provision the Legislature supplied a defect in the common law indicated in the suggestion of Follett, J., above quoted that "a remedy for such cases should be provided by statute." The relator, however, does not claim that this proceeding is within the provisions of this statute and hence he is not entitled to its benefits.

There is another objection to this proceeding. Inspectors of election have both judicial and ministerial duties to perform. In determining what ballots shall be counted for or against any candidate, or any question voted on, or what ballots shall be rejected, they act judicially. They may perhaps be required by mandamus to perform merely ministerial acts in a particular way; and they may also be required to exercise their judicial functions; but they cannot be required by a common-law mandamus to decide in a particular manner. People ex rel. Francis v. Common Council, 78 N. Y. 33, 39; People ex rel. Millard v. Chapin, 104 id. 96, 100; People ex rel. Smith v. Schiellein, 95 id. 124, 133; People ex rel. Fiske v. Devermann, 83 Hun, 181, 184. It is the performance of a judicial act on the part of

Digitized by Google

the inspectors which is complained of in this case; not the failure on their part to act judicially, but the judicial conclusion reached by them; and it is this judicial conclusion which it is sought to have changed. The inspectors have performed the judicial act complained of. They may not have reached a correct conclusion but they have acted and exercised their judgment, and the conclusion reached by them cannot be reviewed herein.

In the case last cited, Cullen, J., said: "The inspectors having made a canvass, could not be compelled or permitted to make a new one. By section 132 of the Election Law (chap. 680 of the Laws of 1892), even where the returns are sent back to inspectors for omissions or clerical errors they are forbidden to change or alter any decision before made by them."

Section 114 of the Election Law above referred to provides for a review of the judicial determinations of election inspectors in mandamus proceedings. But this right on the part of the relator does not exist at common law and as this is a common-law mandamus proceeding the relator cannot avail himself of the statute.

In view of the foregoing observations it is unnecessary to consider the question litigated on the trial as to whether the ballots have been changed since they were counted and canvassed by the defendants.

Peremptory mandamus disallowed, without costs.

JOHN HOOK, Plaintiff, *v.* THE MICHIGAN MUTUAL LIFE INSURANCE CO., Defendant.

(Supreme Court, Albany Trial Term, July, 1904.)

Life Insurance — False answer by the medical examiner.

A false answer to a question in an application for life insurance avoids the policy where the answer was made a warranty.

A person insuring must acquaint himself with the terms of the policy and where he delivers it to the insurer who returns him a copy (which he keeps until his death) an answer in the application by a medical examiner of the company, although false, binds the insured where he knew the answer as recorded to be false.

Digitized by Google

MOTION for nonsuit, decision on which was reserved until after the verdict of the jury pursuant to section 1187 of the Code of Civil Procedure.

Thomas F. Galvan (John H. Gleason, of counsel), for plaintiff.

Henry W. Smith (P. C. Dugan, Jarvis P. O'Brien and W. W. Morrill, of counsel), for defendant.

COCHRANE, J. This action is brought on a policy of life insurance issued by the defendant on the 30th day of September, 1902, for the sum of $1,000, on the life of William Hook, payable to his brother, the plaintiff herein. William Hook died April 17, 1903.

The policy contains the following provision: "This policy is issued in consideration of the application therefor, a copy of which is hereto attached and is made a part of this contract." The application was signed by the insured September 23, 1902, and after certain questions therein propounded and the answers thereto contains the following statement: "I hereby declare, That the above are true answers to the foregoing questions, as well as those made or to be made to the company's medical examiner, and I hereby agree that these statements, whether written by my own hand or not, with this declaration, shall form the basis of the contract for insurance, and that any untrue or fraudulent answers, any suppression of facts in regard to my health, habits or circumstances, or neglect to pay the premium on or before the day it becomes due, shall violate the policy, and forfeit all payments made thereon." The medical examination was made September 26, 1902, the questions and answers being signed by the insured together with a statement that "the answers form an essential part of the contract." The contract also provided that no agent had power to change the terms thereof.

The application of the insured and the answers and statements made to the medical examiner are as much a part of the contract as the policy. Together they constitute the contract between the parties and under the authorities the an-

Digitized by Google

swers made by the insured both in his application and to the medical examiner constitute a part of the contract and are warranties and must be substantially true or the policy will be void. Foot v. Ætna Life Insurance Co., 61 N. Y. 571; Schane v. Metropolitan Life Insurance Co., 76 App. Div. 271; Clemans v. Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485; Cushman v. United States Life Insurance Co., 63 id. 404; Ripley v. Ætna Insurance Co., 30 id. 136; Barteau v. Phœnix Mutual Life Insurance Co., 67 id. 595.

In the medical examination the following question and answer appear: "Has any application for insurance upon your life ever been made to any company or association upon which a policy has not been granted? If so state name of company or association. No." The importance of this question is unchallenged and the untruthfulness of the answer is admitted. An application to one company had been rejected several years prior to the time this question was answered and an application to another company was then pending and was rejected a few days thereafter. The defendant clearly had a right to know about both applications and in the absence of any explanatory evidence on the part of the plaintiff this untrue answer vitiates the policy.

Immediately before the signature of the insured to the medical examination appears the following certificate: "I hereby certify that my answers to the above questions are true and are correctly recorded by the medical examiner." In Grattan v. Metropolitan Life Insurance Co., 92 N. Y. 274, it was said by the court in reference to a precisely similar state of facts and concerning a certificate similar to the one above set forth: "The controversy is thus narrowed to the single question, who was responsible for the falsehood; was the insured chargeable with it, or was it the sole fault of the company through its medical examiner? On the face of the papers it was the insured. His application, signed by him, and with knowledge of the contents of which he is *prima facie* chargeable, declares and warrants that his answers to the questions therein contained, 'and to those in the examiner's report herewith are fair and true.' The

Digitized by Google

examiner's report contains the falsehood; and appended to that is the certificate of the insured, signed by him * * * Stopping at this point the case is clear. It is one in which the truth is told to the medical examiner; where the latter, instead of the truth, writes down a falsehood; where the applicant reads and knows the answer that is written, and with full knowledge of its falsity as written certifies that it is true and 'agrees exactly' with the answers in fact made. This is the applicant's written admission. It is conclusive upon him, unless by some sufficient proof he explains and rebuts it * * *. The insured must show a state of facts indicating honesty and truthfulness on his part, and leaving the burden of having declared an untruth solely upon the agent of the company." The explanatory proof in that case was furnished by a letter which passed between the parties which "tended to explain and rebut the inferences flowing from the certificate of the assured," thereby making a proper question for the jury on that point.

The explanatory proof in this case to overcome and rebut "the applicant's written admission" is claimed by the plaintiff to exist in his own testimony. He testified that he was present at the time of the medical examination and that his brother stated to the medical examiner correctly and accurately the facts in reference to the previous applications. That the examiner recorded the answer to the question and did not read the same to the insured, and that the latter signed the medical examination without reading the same. On this state of facts it is claimed that the examiner and not the insured was responsible for the untrue answer, and the plaintiff relies on the following cases to establish his right to recover notwithstanding such untrue answer: Sternaman v. Metropolitan Life Insurance Co., 170 N. Y. 13; Jacobs v. Northwestern Life Assurance Co., 30 App. Div. 285; affd., 164 N. Y. 582; Peters v. United States Industrial Insurance Co., 10 App. Div. 533; affd., 154 N. Y. 758; O'Brien v. Home Benefit Society, 117 id. 310. If the facts above referred to were the only ones bearing on this point those authorities would be controlling, but I think they have no application to such a situation as is here presented.

Digitized by Google

The principle underlying those cases and which constitutes the basis of the decisions therein is that the insurer is estopped from taking advantage of the errors of its agents in making examinations, taking down answers and reporting them to the company. Sternaman v. Metropolitan Life Insurance Co., 170 N. Y. 13, 25; Miller v. Phœnix Mutual Life Insurance Co., 107 id. 292, 296. In the latter case it was said: "Neither is it generally a defense to an action founded upon such agreement, that the party did not read the contract, or was ignorant of its contents, or that it was prepared by the party claiming the benefit of it, unless he also shows that his signature thereto was obtained by misrepresentation or fraud. In the case, however, of life insurance policies it is the settled doctrine of the modern cases, that where the application for insurance is drawn up by the agent of the insurer, and the answers to the interrogations contained therein, are inserted by him at his own suggestion, without fraud or collusion on the part of the assured, the insurer is estopped from controverting the truth of such statements, or the interpretation which it has given to the answers actually made by the applicant, in an action upon the instrument between the parties thereto. (Plumb v. Cattaraugus Ins. Co., 18 N. Y. 392; Rowley v. Empire Ins. Co., 36 id. 550; Baker v. Home Life Ins. Co., 64 id. 648.)"

Ordinarily, as indicated in the Miller case last cited, it is incumbent on a party to a contract to acquaint himself with its contents, and he cannot escape the consequences thereof by failing to read the same in the absence of fraud or other circumstances such as do not exist in this case. It is only by the application of the principle of estoppel as applied to actions on insurance policies, and as distinguishing such contracts from other contracts, that the plaintiff seeks to avoid the effect of the untruthful answer which the parties have incorporated into the contract between them. But to constitute an act of estoppel it must be such as to mislead another acting in good faith and with reasonable care and diligence (Blair v. Wait, 69 N. Y. 113); and the party setting up the estoppel must be free from laches. Trenton Banking Co. v. Duncan, 86 N. Y. 221, 230.

Digitized by Google

Tested by these principles I do not think the defendant is estopped from setting up the breach of warranty in question. This case is easily distinguishable from those relied on by the plaintiff and above cited. In none of those cases does it appear that copies of the application and medical examination were delivered with the policy as in this case. According to the testimony of the plaintiff the answer under consideration was written down by the examiner without comment or explanation; nothing was said to mislead the insured or the plaintiff or to throw them off their guard. Copies of all questions and answers were attached to the policy when it was delivered by the company's agent. It was received by the plaintiff who was the beneficiary named therein and the initial premium was paid by him. He procured the application to be made and sent the defendant's agent to the insured for that purpose. The policy and copies of the application and of all questions and answers have ever since the delivery thereof remained in possession of the plaintiff. Whether in his possession or that of the insured is immaterial as far as this question is concerned. He as well as the insured knew the facts concerning the prior applications for insurance because he testifies that he was present and heard his brother state those facts to the medical examiner at the time when it is claimed that the latter recorded the false answer. Before accepting and paying for the policy it was incumbent upon the insured or the plaintiff to examine the same. It was for this purpose that copies of the application and questions and answers were attached to the policy and delivered therewith. Good faith toward the defendant as well as reasonable care on the part of the plaintiff required an examination of the contract, and a failure to make such examination constituted laches on the part of the plaintiff which precludes him from asserting an estoppel against the defendant.

In New York Life Insurance Co. v. Fletcher, 117 U. S. 519, it was said: "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to

Digitized by Google

the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements." The opinion in that case as above set forth is directly in point here and is not in conflict with any of the cases relied on by plaintiff.

It further appears that the same question was asked in the application made three days before the medical examination and that the same answer was given. The plaintiff called the company's agent as a witness and it appears from his testimony that the insured gave to him correct information as to one of the prior applications but gave him no information whatever concerning the other. The answer in the application was falsely recorded by the agent who testifies that thereafter he handed the application to the insured for his signature, and that he does not know whether or not the insured read it. The presumption is that he did read it. The case, therefore, shows as a matter of law an incomplete and hence an incorrect answer on the part of the insured to the agent of the defendant who recorded the answers contained in the application; and also knowledge on the part of the insured that such answer as given by him to the agent was improperly recorded by the latter in the application. Plaintiff contends that this circumstance is immaterial in view of the fact that correct information was subsequently given to the medical examiner. We have seen, however, that it is incumbent on the plaintiff to show a state of facts indicating honesty and truthfulness on the part of the insured; and also to show reasonable care and diligence and good faith toward the defendant. And the fact that the insured knew that in his application the answer to the question under consideration was false has a bearing on this branch of the case unfavorable to the plaintiff.

Motion for nonsuit granted.

Digitized by Google

JOHN K. CULLIN, Plaintiff, *v.* MARTHA R. RYDER et al., Defendants.

(Supreme Court, Columbia Special Term, July, 1904.)

Bill of sale given for the vendor's future support — Failure to renew a chattel mortgage — Who cannot take advantage thereof — Meaning of the term "creditor" as used in the Lien Law.

A bill of sale, the consideration of which is the support and maintenance of the vendor during the remainder of his life, is void as to his creditors under section 23 of the Personal Property Law.

The failure to file in due time a renewal of a chattel mortgage does not render such mortgage void as against a subsequent chattel mortgagee who had actual notice of the existence of the prior mortgage.

A person not having a judgment and execution is not a "creditor" within the meaning of sections 90 and 95 of the Lien Law.

THIS is an action to foreclose a chattel mortgage executed by the defendant Ryder to the plaintiff on the 27th day of November, 1902, for the sum of $2,196.

The property covered by the mortgage was formerly owned by Allen Reynolds who on November 4, 1902, executed to the defendant Ryder a bill of sale thereof. The consideration of this bill of sale was the support and maintenance of the said Reynolds during the remainder of his life.

November 17, 1902, Reynolds executed to Ryder a chattel mortgage covering the same property, the consideration thereof as therein expressed being to secure a promissory note for the sum of $2,000 given on the same day by Reynolds to Ryder. This mortgage was filed in the town clerk's office the day after it was executed.

November 27, 1902, the plaintiff's mortgage which he seeks to foreclose herein was executed by Mrs. Ryder to secure the payment of a promissory note for $2,196 which was a part of a real estate mortgage indebtedness existing against the farm which was on the same day conveyed by

Digitized by Google

Reynolds to Mrs. Ryder and which indebtedness was assumed by the latter.

Reynolds while the owner of the property in question and on April 2, 1901, executed to the defendant William Smith a chattel mortgage for the sum of $740, covering the property involved herein which mortgage was duly filed April 4, 1901. It was not renewed, however, until April 15, 1902, eleven days after the expiration of the time within which the same should have been renewed as provided by statute.

An action was brought by Smith against Reynolds, after the execution of the plaintiff's mortgage, to foreclose the Smith mortgage and judgment was recovered in such action, prior to the commencement of this action, which judgment among other things appointed the defendant Macdonald as receiver of the mortgaged property, and directed him to sell the same and out of the proceeds thereof to pay Smith $495.37, the amount due on his mortgage, including the costs of the action.

The defendant Smith and Macdonald as such receiver defend this action, claiming that the mortgage to Smith is a prior lien to the plaintiff's mortgage notwithstanding the failure to renew the same as provided by statute.

A. Frank B. Chace & Sons (John Cadman, of counsel), for plaintiff.

John L. Crandell, for defendant Smith and Macdonald, as receiver, etc.

COCHRANE, J. The bill of sale from Reynolds to Ryder having been given for the future support and maintenance of Reynolds was void as to his creditors. Pers. Prop. Law, § 23. Smith was a creditor of Reynolds and hence as to him the bill of sale is within the condemnation of the statute. His claim as such creditor was established by judgment before the commencement of this action and is not questioned herein.

Digitized by Google

The chattel mortgage from Reynolds to Ryder was expressly declared therein to be "subject to the provisions of a previous chattel mortgage," meaning the Smith mortgage, which was concededly the only mortgage then on the property.

The defendant Ryder consequently received no title to the property in question as against Smith. Her bill of sale was void as to him, and her chattel mortgage was expressly declared to be subject to his mortgage. Whatever title she received to the property, either by virtue of the bill of sale or chattel mortgage, was subject to the interest of Smith therein.

The plaintiff was fully aware of the origin and source of Mrs. Ryder's title. According to his testimony, when he took his chattel mortgage from the defendant Ryder he was aware of the actual consideration of her bill of sale. He had full knowledge of the imperfections and defects which existed in her title by virtue of her bill of sale. The objectionable features were known to him because he says so. Mrs. Ryder could give to Cullin no better title than she had received from Reynolds, which title so received by her was expressly subject to the Smith mortgage; and Cullin could acquire from her no greater interest in the property than he might have acquired from Reynolds if the latter had not executed to Ryder any bill of sale or chattel mortgage.

The plaintiff, therefore, is not entitled to any more favorable consideration than if his claim had been derived directly from Reynolds. But in the latter event, as the facts now appear, plaintiff could not avail himself of the failure of Smith to renew his chattel mortgage. Smith testified on the trial without contradiction that his mortgage was taken at the suggestion of the plaintiff and that, after the time when it was originally filed, he informed the plaintiff of its existence. Part of the consideration of the Smith mortgage was received by plaintiff to apply on the real estate mortgage indebtedness against the Reynolds' farm. Plaintiff, therefore, had actual notice of Smith's mortgage and cannot take advantage of the failure to properly renew the same. McCormack v. Venable, 34 N. Y. St. Repr. 717; affd., 133

Digitized by Google

N. Y. 536; Zimmer v. Wheeler, 2 N. Y. St. Repr. 325; Gildersleeve v. Landon, 73 N. Y. 609; Mack v. Phelan, 92 id. 20, 25; Eastern Brewing Co. v. Feist, 21 Misc. Rep. 681.

The plaintiff not having a judgment and execution is not a "creditor" within the meaning of sections 90 and 95 of the Lien Law. Jones v. Graham, 77 N. Y. 628.

It follows that the mortgage of the plaintiff is subsequent in lien to the mortgage of Smith and that the motion of the defendant Smith and Macdonald, as receiver, made on the trial for a dismissal of the complaint must be granted.

Complaint dismissed as to the defendant Smith and Macdonald, as receiver, etc., with costs not including an additional allowance.

Ordered accordingly.

MARVIN H. TANNER, President of the National Carriage Dealers' Protective Association, an Unincorporated Association, Plaintiff, *v.* WILLIAM RANKEN et al., Defendants.

(Supreme Court, Columbia Special Term, July, 1904.)

Unincorporated association — Removal of member.

Where a person's election to office came from an unincorporated association itself, his removal therefrom can be accomplished only by the association.

A person cannot restrain officers of an association where he has not been recognized by it.

MOTION by plaintiff to continue an injunction restraining the defendants from holding themselves out as officers of the National Carriage Dealers' Protective Association, an unincorporated association.

Peck & Behan, for motion.

H. P. Humphrey, opposed.

Digitized by Google

COCHRANE, J. On the facts appearing from the papers submitted on this motion, such motion cannot be granted. The plaintiff claims to have been elected president of the association at a meeting thereof held in Philadelphia in October, 1903. The by-laws of said association in force at that time provided for a meeting of the association in the month of October "at such time and place as shall be agreed on at the previous meeting of the association; or in the absence of such action by the association, the executive committee shall designate such time and place of meeting." The defendant's affidavits show that no time and place for the October meeting had been agreed on at the previous meeting of the association, and that such time and place had not been designated by the executive committee. The only statement I find in the plaintiff's affidavits bearing on this question is a general statement contained in the complaint, "that the last meeting of said association was duly held on the 13th day of October, 1903, in the convention hall of the National Export Exposition Building in the city of Philadelphia, Pa.; that day and place having been duly designated for that purpose by said association." If by this general statement it is meant that the day and place for the October meeting had been designated by the previous meeting of the association, such statement is controverted by the defendants' affidavits, and cannot be deemed to be established on this motion. It furthermore appears without contradiction that the defendant Ranken was duly elected secretary of the association at the meeting thereof in October, 1902, for the term of one year; that at a meeting of the executive committee held on the 1st day of August, 1903, such committee assumed to remove Ranken from the office of secretary, and to appoint one Remsen in his place; and that the call for the meeting in October, 1903, was signed and sent out by said Remsen, assuming to act as such secretary. The by-laws of the association gave to the executive committee no power to remove Ranken or to appoint his successor. His election came from the association itself and was for the term of one year, and his removal from office could only be accomplished by the body which elected him.

Digitized by Google

Notice of the October meeting of the association in 1903 was not sent to all of the parties entitled thereto, and the meeting was only attended, according to the affidavits before me, by not more than 25 out of an active membership of from 600 to 1,000. Ranken, who was the secretary of the association, and for aught that appears was lawfully entitled to participate in the proceedings, was forcibly excluded therefrom. It requires no argument to demonstrate that a person basing his claim to an office on an election at a meeting thus called and thus conducted must fail in his contention.

The plaintiff urges, however, that the election at Philadelphia in October, 1903, cannot be reviewed in this case or in a court of equity. It may be true as a general proposition that the title to an office even in an unincorporated association cannot be tried in an equity action. But the plaintiff brings this action under section 1919 of the Code of Civil Procedure, by virtue of the fact that he is "the president or treasurer of an unincorporated association consisting of seven or more persons." It is necessary for him to allege and prove, as a necessary prerequisite to his right to maintain the action under this Code provision, that he is president of the association. The plaintiff himself in an action of this kind introduces the question of his title to the office which he must necessarily establish, when it is controverted. In Ostrom v. Greene, 161 N. Y. 353, an action in equity brought by the president of an unincorporated association, the court said: "The main question presented for decision is whether there was evidence to support the finding that the plaintiff was president of the association when this action was commenced." After reviewing the facts at length, the court again said: "We thus reach the controlling question whether the trial court could properly draw the inference from these facts that Mrs. Ostrom (the plaintiff) was president of the association when this action was commenced," and the conclusion was reached by the court, after considering the regularity of the meeting at which she was elected, "that her election was in all respects regular and valid," and that she had the right to bring the action under the Code provision above referred to. So in Reis v. Rohde, 34 Hun, 161,

Digitized by Google

it was said (at p. 166), that "a claimant in possession may maintain an action to restrain, and in such and like cases the right of possession or title may be determined in so far as it may be necessary to determine the action."

But it is further contended by the plaintiff that it is immaterial whether or not he was lawfully and regularly elected to the office of president; that he may restrain the defendants from interfering with himself and his fellow officers, who were elected at the same time, provided plaintiff and his fellow officers are *de facto* officers, and are recognized by the association, or the members thereof as properly elected, and as properly in the discharge of the functions of such offices. The difficulty with that contention is that the facts here do not warrant the application of the principle contended for, assuming the contention to be well founded in a proper case. In Reis v. Rohde, *supra*, it appeared that the plaintiffs were recognized by the organization which they claimed to represent as properly elected, and the court held (p. 162) that it was a case calling for equitable interference, not on the ground "that the individual plaintiffs were duly elected, but on the ground that they were recognized by the authorities then existing." I have searched in vain in the papers before me for any evidence of recognition of the plaintiff and his alleged fellow officers by the organization they claim to represent. The general statements in the moving papers to the effect that since their election they have been actively and continuously performing the duties of their office are in substance controverted in the opposing affidavits. No facts are set forth from which it can be seen to what extent or in what manner they have been performing such duties, nor to what extent if at all, such duties have been recognized and accepted by the various members of the association. It appears on the other hand that the defendants have been assuming to exercise the duties of the offices to which they respectively claim to have been elected; and one of the grounds on which the injunction is sought is that the defendant Ranken is adjusting complaints of members of the association, such adjustment being within the proper duties of the secretary. It is clear he could not adjust such complaints unless

Digitized by Google

they were submitted to him by the various members of the association, and hence it is obvious that he receives a certain amount of recognition. If it be claimed that the Troy meeting in February, 1904, at which the defendants claim to have been elected, was irregular and unauthorized, the answer is that as the facts now appear, the Philadelphia meeting in October, 1903, was equally irregular and unauthorized. The latter meeting being attended by twenty-five, was not nearly as large, and hence not as representative as the Troy meeting, which was attended by one hundred and five active members in person or by proxy. So far as the facts are disclosed on this motion, the defendants are receiving greater recognition as officers of the association, than those elected as officers at the Philadelphia meeting. If the will of the majority is to control, the defendants seem to have a greater number on their side.

It is possible, however, that the facts are in reality different from what appear to be the facts from the papers used on this motion, and hence although the motion must be denied, such denial should be without prejudice to a renewal thereof.

Motion denied with ten dollars costs, and with leave to the plaintiff to renew the same on payment of such costs.

Motion denied, with ten dollars costs, with leave to plaintiff to renew on payment of costs.

GEORGE W. HARRISON, Plaintiff, *v.* MARIE W. WALLIS and EDWIN A. WALLIS, Defendants.

(Supreme Court, New York Trial Term, July, 1904.)

Lis pendens — Service by publication on non-residents.

It is competent for the Legislature to declare — for the purposes of service of process — that "Sunday * * * shall be regarded as the time between sunrise and sunset," and where service on non-residents, of a notice of *lis pendens* is by statute required to be made by publication in a newspaper for four consecutive weeks, the last publication to be at least two weeks before

Digitized by Google

the return day, and the date of the first publication is January 17th and that of the last February 14th, both Sundays, a defendant, who alleges that the notice was not published pursuant to the requirements of the local law and hence that the court had not jurisdiction, must show that the newspaper containing the notice was actually published after sunrise on the Sundays in question.

CAUSE resubmitted to the court, without a jury, by stipulation dated January 22, 1904.

Action by the payee of a promissory note against the joint and several makers thereof, the defenses being usury and payment. A counterclaim also was interposed by the defendants for the rents, issues and profits of certain lands at Albuquerque, N. M., mortgaged to secure the payment of the note, the plaintiff being alleged to be a mortgagee in possession.

George P. Breckenridge, for plaintiff.

Wilson & Wallis, for defendants.

BISCHOFF, J. The action is upon the joint and several promissory note of the defendants, for $8,000, with interest at the rate of twelve per cent. per annum, and an additional ten per cent. of the amount found due, as an attorney's fee in case of a suit to enforce the collection of the note. It was made at Albuquerque, N. M., dated November 7, 1893, and payable at the same place, to the plaintiff's order, one year after its date. Being admittedly a contract governed by the laws of New Mexico the attempted defense of usury is insufficient because embodying no allegation that the agreement provided for the payment of sums which were usurious under the laws of that Territory. Cutler v. Wright, 22 N. Y. 472, 474. The validity of the note, under the foreign law, has been shown, however, for the plaintiff, without evidence to the contrary in behalf of the defendants, and the amount due is established in accordance with the averments of the complaint.

The defendants' answer to the complaint in this action alleges that at the time of the delivery of the note the defendant Marie W. Wallis was the owner of three distinct parcels

Digitized by Google

of land at Albuquerque, and that to secure the payment of the note she, jointly with the other defendant, executed and delivered a mortgage of such lands to one Willard S. Strickler, as trustee for the plaintiff and any transferee of the note, and that the plaintiff subsequently entered into the possession of the mortgaged lands, and ever since has been in the receipt of the rents, issues and profits thereof. Because of those facts it is claimed that the amount so received by the plaintiff should be credited to the defendants toward the payment of any indebtedness upon the note. In connection with the defense of payment the answer further alleges that subsequent to the execution and delivery of the mortgage the plaintiff and Strickler instituted an action against the defendants in a court of the Territory of New Mexico, which action resulted in a decree for the sale of the lands, and that upon such sale the lands were sold to the plaintiff, or to some one for his use; and it is charged that the proceedings were wholly void in that they "were not in accordance with the laws of the Territory of New Mexico," that they "were instituted and carried through without the knowledge of these defendants, and without notice to them, or either of them," and that "no notice of said pretended proceedings was ever given to or received by these defendants, or either of them, and that they had no knowledge thereof until just prior to the commencement of this action." The sufficiency of the facts stated to support the defense of payment is well open to question, as involving no agreement for the appropriation of the rents, issues and profits, but in view of the conclusion reached by me concerning the validity of the New Mexico decree, and the proceedings thereunder, the discussion of this attempted defense seems useless. No reply thereto was made or required.

For the purposes of a counterclaim against the amount due upon the note the defendants reasserted the facts of the mortgage and the plaintiff's subsequent entry into possession of the mortgaged lands, as well as his continued receipt of the rents, issues and profits thereof, omitting all allusion to the New Mexico action other than that the plaintiff's entry into possession of the mortgaged lands was "without any lawful

Digitized by Google

proceedings, instituted and carried through for that purpose, and without extinguishing the right of redemption in said premises vested in these defendants or one of them." These facts were formally put in issue by the plaintiff's reply.

Upon the trial of this action the defendants introduced in evidence a duly exemplified copy of the judgment-roll of the District Court of the Second Judicial District of the Territory of New Mexico, in and for the county of Bernalillo, where the mortgaged lands were situated, from which it appears that on January 16, 1897, the plaintiff in this action and the said Willard S. Strickler filed their bill of complaint in that court against the defendants here, asserting the note and mortgage above-mentioned according to the true tenor and effect of each, that the note remained wholly unpaid, that the defendants were nonresidents of the Territory of New Mexico and residents of the State of New York, and praying, among other things, that the mortgaged lands be sold to satisfy the indebtedness upon the note, and that a subpœna in chancery issue to the defendants, commanding them to appear on a day certain, then and there to answer the bill of complaint. It further appears from the judgment-roll that upon the plaintiff's application service of a notice of the pendency of the action was directed to be made upon the defendants as nonresidents of the Territory of New Mexico, by publication; that the notice was thereafter published in the Albuquerque Morning Democrat, a newspaper published in Bernalillo county; that a decree *pro confesso* was taken against the defendants on March 20, 1897, upon their default in appearance; that pursuant to the directions of the decree the mortgaged lands were thereafter sold to the plaintiff; that the sale was approved, and the master's deed of the lands executed and delivered to William B. Childers at the plaintiff's request, and for his use. From a series of deeds, also introduced in evidence for the defendants upon the trial of this action, the contents of which need not be particularly set forth, it also appeared that the plaintiff, Harrison, entered into possession of the lands sold to him, and that he and his grantees have continued in such possession.

Digitized by Google

It is conceded that the New Mexico court had jurisdiction of the subject-matter of the action, and no question is raised but that the notice of the pendency of the action was the proper process by means of the service of which the court would secure jurisdiction of the defendants for the purposes for which the action was brought. Neither is it disputed that the notice was in proper form and properly issued, nor that the newspaper in which the notice was published was properly selected and designated for that purpose, the defendants' contention being that the court did not acquire jurisdiction of them for the purposes of the action because of a noncompliance with the laws of the Territory of New Mexico respecting service of the notice by publication, a ground of attack upon the decree of foreclosure and sale of the mortgaged premises which the plaintiff does not deny was available to the defendants, if sufficiently pleaded. Monroe v. Douglas, 4 Sandf., Ch. 126, 143; Arndt v. Griggs, 134 U. S. 316; Lynch v. Murphy, 161 id. 247; Cooper v. Newell, 173 id. 555. The plaintiff objected to the introduction of the judgment-roll, however, and to evidence in support of the stated ground of attack, basing the objection upon an alleged defect in the answer in that the latter did not specify the claimed want of jurisdiction of the New Mexico court, of the defendants, with the necessary particularity, citing in support of the objection Black Judg., § 898, and Rice v. Coutant, 38 App. Div. 543, 546. The rule of pleading, however, which the plaintiff seeks to invoke, that a denial merely of the foreign judgment does not open the way for the introduction of evidence in conflict with the recitals of the judgment-roll, can have no proper application to the case at bar. The plaintiff's cause of action is not upon the judgment, and the allusions to it in the defendants' answer are in no aspect a constituent of either the defense of payment or of the counterclaim. These allusions, in effect, are merely anticipatory of what it was supposed the plaintiff would endeavor to show upon the trial in avoidance of the defense and counterclaim. They involve no more than a pleading of probative facts, evidence of the plaintiff's entry into possession of the mortgaged lands and his receipt of the income thereof, and

Digitized by Google

are matter which should be treated as redundant and surplusage, and which, upon a proper motion, should have been eliminated from the answer. Bliss Code Pl. (2d ed.), § 215; Pom. Code Rem. (3d ed.), §§ 551, 552; Park & Sons Co. v. Nat. Wholesale Druggists' Assn., 30 App. Div. 508; Sands v. St. John, 23 How. Pr. 140. Every allegation of the answer material to the defense stood controverted without a reply, and the allegations material to the counterclaim were controverted by the reply. Code Civ. Pro., § 522. It was, therefore, not only competent to the plaintiff, but incumbent upon him to show upon the trial, by the record of the New Mexico judgment, that he was in possession of the lands as the owner thereof, the fact of such possession being conceded. The fact that the defendants assumed the task of doing this for him affords the plaintiff no cause for grievance. With the record of the New Mexico judgment in evidence it was competent for the defendants to show that the record was not what it purported to be, either in law or in fact, this being the first opportunity properly afforded the defendants of denying the existence of the judgment upon which the plaintiff necessarily relied.

The defendants' attack upon the judgment was based upon the ground, as already stated, that it was void as to them for want of jurisdiction in that it was claimed that the notice of the pendency of the action was not published pursuant to the requirements of the local law, and hence that the New Mexico court was without power to proceed in the action and to direct a sale of the mortgaged lands. In their attempted support of this contention the defendants introduced the Compiled Laws of the Territory of New Mexico, of 1897, and therefrom it appeared (§ 2964) that service of the notice of the pendency of the action upon nonresidents of the territory was required to be made by publication thereof in some newspaper published in the county where the cause is pending "for (§ 2956) four consecutive weeks, the last publication to be at least two weeks before the return day to which the process is returnable," which, in the action involved in the judgment-roll in evidence, was March 1, 1897. The judgment-roll showed, by the affidavit of T. M. Wingo, business

Digitized by Google

manager of the Albuquerque Morning Democrat, that the notice was "duly inserted in said newspaper for four successive weeks, the date of the first publication being the 17th day of January, 1897, and the day of the last publication being the 14th day of February, 1897," each of which dates fell upon a Sunday, because of which last-mentioned fact the defendants insist that the service was void, service of judicial process being interdicted upon Sunday, at common law and under the statute of New Mexico. The Compiled Laws, hereinbefore mentioned, provided (§ 1371) that "No civil process shall be issued or served on said day (Sunday), except in cases of capias, attachment or replevin, when the plaintiff, or his agent, shall make oath that he is in danger of being subjected to a loss or serious inconvenience unless process shall be issued or served on said day. In all other cases any civil process issued or service thereof, on said day, shall be void." It also appeared from the Compiled Laws, however (§ 1372), that "Sunday, for the purposes of this act, shall be regarded as the time between sunrise and midnight of said day." The New Mexico judgment was presumptively valid (Shumway v. Stillman, 4 Cow. 202), and to prove it otherwise it was, therefore, incumbent upon the defendants to show that the newspaper containing the notice was actually published after sunrise on the days mentioned. There is no such evidence.

Service of judicial process on Sunday was unquestionably void at common law. *Dies Dominicus non est juridicus.* 27 Am. & Eng. Encyc. of Law, 389; 19 Encyc. of Pl. & Pr. 600; Story v. Elliot, 8 Cow. 27; People v. Dewey, 23 Misc. Rep. 267. Ordinarily, also, Sunday comprehends the natural day, the time from midnight to midnight. 27 Am. & Eng. Encyc. of Law, 388; Pulling v. People, 8 Barb. 387. But it was competent to the Legislature of New Mexico to regulate the observance of the day, and to pronounce valid acts otherwise invalid if performed on that day (27 Am. & Eng. Encyc. of Law, 388; Lindenmuller v. People, 33 Barb. 548; Neuendorff v. Duryea, 69 N. Y. 557; People v. Havnor, 149 id. 195; People v. Moses, 140 id. 214), and it was held accordingly in Connecticut (Fox v.

Digitized by Google

Abel, 2 Conn. 541), where Sunday was defined to mean only the solar period of the day, the time intervening between sunrise and sunset, that an execution against the plaintiff's person was lawfully enforced by his arrest between midnight preceding and daybreak of Sunday; and in Massachusetts (Johnson v. Day, 17 Pick. 106), where service of judicial process was forbidden on Sunday between midnight preceding and the sunset following, that the issuance of a writ of attachment against the defendant's property, and a levy under it, after sunset on Sunday, were valid and effectual. It cannot be successfully urged that the interdiction of the issuance or service of judicial process during specified hours or periods of the day did not have the effect of sanctioning such issuance or service at other times of the same day, for unless it be deemed to have been the intention of the Legislature to legalize the issuance and service of process, except as expressly inhibited, the latter provisions would be meaningless. It is one of the canons of statutory interpretation and construction that *expressio unius est exclusio alterius* (Broom Legal Max. [7th ed.] 501; Suth. Stat. Const., § 325 *et seq.*), and it is peculiarly apposite to the legislation under discussion. For the reason stated, therefore, the publication of the notice of the pendency of the New Mexico action is not to be pronounced ineffectual for the purpose of service upon the defendants because it occurred on Sunday.

Again, the Compiled Laws of New Mexico required (§ 2900, subd. 7) that in the computation of time "the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday," and hereof it is argued that since the first day of publication of the notice of the pendency of the action was Sunday, January seventeenth, the period of publication, four weeks, did not begin until Monday, January eighteenth, and so did not end until the expiration of Monday, February fifteenth, which was one day short of two weeks before Monday, March first, the return day of the notice, the local law requiring the last "publication" to be two weeks in advance of the return day, reference being had to section 2956 of the

Digitized by Google

Compiled Laws hereinbefore quoted. In this respect, however, I incline to the view that the defendants err in their construction of the law. Obviously, by the last "publication" the last act of making the notice public, the last insertion in the newspaper prescribed, was intended, not the last day of the period for which the publication was directed. At the time of the original enactment of the law many of the counties in New Mexico had none but weekly newspapers, and it is conceded, therefore, that a publication once a week was all that was required. It appears from the deposition of William B. Childers that there was no Monday issue of the Albuquerque Morning Democrat, that the notice was actually published six times a week for four consecutive weeks, and from the affidavit of T. M. Wingo it appears that the notice was published for four successive weeks, the first publication being on January seventeenth and the last on February fourteenth. But if it be assumed that the publication occurred on the Sundays only beginning with January seventeenth, the last necessary publication was on Sunday, February seventh, and so the full period of publication, four weeks, was completed before March first, the return day of the notice. That the notice was published for a longer time than was necessary did not vitiate it or its service. Taylor v. Coots, 32 Neb. 30; Fouts v. Mann, 15 id. 172; Hernandez v. Drake, 81 Ill. 34; Atkinson v. Duffy, 16 Minn. 45; Burnes v. Burnes, 61 Mo. App. 612; Iowa St. Sav. Bank v. Jacobson, 8 S. Dak. 292. It is urged for the defendants, however, that since the fourth consecutive week following January seventeenth did not expire until Sunday, February fourteenth, the period for which publication was directed was concluded only with Monday, February fifteenth, and that since in the computation of time the following day, February sixteenth, was to be excluded as the first day of the two weeks preceding the return day of the notice, the prescribed time between the expiration of the period of publication and the last-mentioned day, March first, two weeks was not afforded. As intimated, however, I do not construe section 2956 of the Compiled Laws to demand that the period of publication should be completed two weeks in advance of the return day. The last

Digitized by Google

advertisement or insertion of the notice only was required to be had at least two weeks before such day. The "last publication" comprehended the last act of making public, and was not synonymous with the last day of the period for which publication was required to be made. The local law was, therefore, satisfied when the notice was inserted in the prescribed paper during the fourth consecutive week following the first publication and at least two weeks before the return day, and this was on Sunday, February seventh, the first day of the fourth week. Statutory provisions of similar import, and almost identical in language, have been so construed in other jurisdictions. In Lowenstine v. Gillespie, 6 Lea (Tenn.), 641, under a provision requiring publication "for four consecutive weeks, * * * the last publication to be at least one week before the time fixed for the defendant's appearance," it was held that four publications, a week apart, and a week between the last publication and the day for appearance — twenty-eight days in all — were sufficient. A week after the expiration of the full four weeks was not required. See also Calvert v. Calvert, 15 Colo. 390; Decker v. Myles, 4 id. 558; Knowles v. Summey, 52 Miss. 377; Martin v. Hawkins, 62 Ark. 421; Guilford County v. Georgia Co., 109 N. C. 310; Wells v. Kelly, 11 Utah, 421; Knowlton v. Knowlton, 155 Ill. 158; Banta v. Wood, 32 Iowa, 469; Sweet v. Sprague, 55 Me. 190; Davis v. Huston, 15 Neb. 28; Alexander v. Alexander, 26 id. 68; Marling v. Robrecht, 13 W. Va. 440; Savings & Loan Soc. v. Thompson, 32 Cal. 347; Haywood v. Russell, 44 Mo. 252; Mowry v. Blandin, 64 N. H. 3. Though the cases are not directly in point, this construction also seems to be sanctioned by our court of last resort in Olcott v. Robinson, 21 N. Y. 150, and Wood v. Morehouse, 45 id. 369. Market Nat. Bank v. Pacific Nat. Bank, 89 N. Y. 397, proceeded upon an express provision of our Code of Civil Procedure that the full period of publication shall be completed before the defendant's time for appearance shall commence. I am referred to no adjudication of a court of New Mexico where the particular section of the Compiled Laws (2956) under present examination was considered and construed, and the testimony of the *juris consulti,* called and

Digitized by Google

examined as witnesses upon the trial of this action, suffers the controlling construction in New Mexico to remain debatable. I am called upon, therefore, to determine the law of New Mexico upon this point, as a question of fact, paying heed to the obvious meaning of the language of the section, and being guided by the settled rules of construction, and such construction as the courts of other jurisdictions, and our own court of last resort, have given to statutory provisions, related in import and clothed in the same or similar language. Suth. Stat. Const., § 192; Smith v. Bartram, 11 Ohio St. 690; Dupuy v. Wurtz, 53 N. Y. 571, citing 12 Moore, 306. True, in Blackwell v. First Nat. Bank of Albuquerque, 10 N. M. 555, the court had before it section 4076 of the Compiled Laws of the Territory, which provided for the publication of notice of the sale of lands for unpaid taxes "once a week for four consecutive weeks, the last publication to be at least one week prior to the day of sale," and it was held that this language called for an interval of full thirty-five days between the date of the first publication and the day of the sale. But the opinion in that case does not undertake to discuss the meaning of the language of the section of the Compiled Laws involved, and, so far as it appears, the *ratio decidendi* of the case was the ruling in Early v. Doe, 16 How. (U. S.) 610, which is cited approvingly, but where the language construed was essentially different in its effect. The statute there considered provided "that public notice of the time and place of the sale of real property for taxes due to the corporation of the city of Washington shall be given by advertisement inserted in some newspaper published in said city, once in each week for at least twelve successive weeks." This was held to call for a notice of eighty-four days before the day of sale. It is apparent, however, that the meaning of the words "the last publication to be at least two weeks before the return day to which the process is returnable," in connection with the remainder of the text of section 2956 of the Compiled Laws of New Mexico, or of the words "once a week for four consecutive weeks, the last publication to be at least one week prior to the day of sale," as used in section 4076, were not, and could not have been, involved. Section

Digitized by Google

2701 of the Compiled Laws of New Mexico relates to attachments of property and provides for the publication of a notice to the defendant "four weeks successively in some newspaper printed in this Territory, the last *insertion* to be not less than two weeks before the first day of the next term." Though not applicable to the action under review, this section is *pari causa,* and serves to illustrate the intention of the lawmakers when speaking of the "last publication" in other parts of the same compilation of laws, and it is not an unreasonable assumption that uniformity in the method of procedure was intended and desired.

I am not unmindful of the rule which should ordinarily obtain, that effect is to be given by the courts of one State to statutes of other States as construed by the home courts (Jessup v. Carnegie, 80 N. Y. 441), but the Blackwell case did not involve the construction of the particular section (2956) of the Compiled Laws now under review, and I am not inclined to follow that ruling, for the reasons that it is in conflict with the construction involved in the action shown by the judgment-roll in evidence, that it obviously proceeded upon a misconception of what was decided in the Early case, that its controlling effect upon the section here under review is in serious doubt, as appears from the testimony of members of the bar of New Mexico examined as witnesses upon the trial of this action, that it tends to destroy uniformity of the method of procedure in New Mexico, that it is in conflict with the construction given to similar statutory provisions by the courts of other jurisdictions, and is opposed to what appears to be the view of our own court of last resort.

Other points discussed by counsel for the defendants upon their brief involve no question of the jurisdiction of the New Mexico court, and present only alleged errors in the method of the sale of the mortgaged lands, which are not open to review by the courts of another State. From what has been hereinbefore said it follows, of course, that the defendants have not been successful in their attack upon the New Mexico judgment, and so have failed to establish either their defense or their counterclaim. Judgment is, therefore, directed for the plaintiff, but the allowance of the ten per cent. for at-

Digitized by Google

torneys' fees, as provided by the note, is subject to a deduction of $1,025.08, which amount was once charged against the collections upon foreclosure, for the purposes of the balance stated for application to the debt.

Judgment accordingly.

THE JOHNSTOWN MINING CO., Plaintiff, *v.* E. ROLLINS MORSE and THE BUTTE & BOSTON CONSOLIDATED MINING CO., Defendants.

(Supreme Court, New York Special Term, July, 1904.)

A State court is without jurisdiction to enjoin proceedings in a Federal court — To enjoin a litigant is to enjoin the court.

A State court has no jurisdiction to enjoin parties prosecuting contempt proceedings before a Federal court in another State, from continuing such prosecution notwithstanding the fact that the State court has jurisdiction of all the parties to the proceedings in the Federal court.

To enjoin litigants from proceeding in court is in effect to enjoin the court itself, particularly where the proceeding sought to be enjoined is one to punish for a contempt of court.

MOTION by plaintiff for an order to show cause why defendants should not be punished for contempt of court in willfully violating an injunction order granted in this action, March 21, 1904.

Franklin Bien, for plaintiff.

Shearman & Sterling (John A. Garver, of counsel), for defendants.

BLANCHARD, J. This is a motion on behalf of the plaintiff upon the return of an order requiring the defendants to show cause why they should not be punished as and for a contempt of this court in willfully violating the injunction order granted in the action on March 21, 1904. This injunction order is as follows: "It is further ordered that the

Digitized by Google

defendants and each of them, their and each of their agents, servants, attorneys, employees and all other persons acting on their or either of their behalf, be, and each of them is hereby, restrained and enjoined from proceeding with the contempt proceedings instituted against plaintiff by means of service upon its employees, Carlos Warfield and Alfred Frank, returnable before the Circuit Court of the United States, Ninth Circuit, District of Montana, in the actions instituted by the defendants on the 22d day of March, 1904, or any time thereafter, until plaintiff has been made a defendant in such actions and served with a copy of the injunction, and has appeared in such actions so as to give the court jurisdiction, as provided for by the laws of United States and the States of Montana and New York; also from taking any further proceedings against the employees of the plaintiff herein, including Carlos Warfield and Alfred Frank, in the actions instituted by the defendants as aforesaid, in which plaintiff is not a party plaintiff or defendant. That any deviation or violation of the injunction hereby granted will be deemed as a contempt of this court. It is further ordered that the preliminary injunction hereby granted shall, and it is not intended to, operate against or enjoin any of the courts of the United States, or the State of Montana, in proceeding in any action pending before the respective courts, but is only intended as an injunction against the defendants and each of them, their agents, attorneys, servants and employees, and all other persons acting on their behalf." It appears that in 1897 the defendant Morse held a five-sixths interest in the Michael Davitt mine in Montana, as trustee for the defendant the Butte & Boston Consolidated Mining Company, and that in that year he conveyed such interest to that company. Prior to this conveyance, and in March, 1897, he had instituted an action in the United States Circuit Court, District of Montana, to restrain the Montana Ore Purchasing Company, F. Augustus Heinze, Carlos Warfield and others from mining or extracting ores from said mine, and he obtained a temporary injunction to that effect in the action. After he had made the conveyance to the Butte & Boston company, that company, in May, 1898, commenced a similar

Digitized by Google

suit, in the same court, and obtained a similar injunction. While these two actions were pending in the Federal court in Montana the plaintiffs in the actions submitted to the court such proof that certain parties, the defendants and others, were disobeying the injunction orders that the court granted an order directing such parties to show cause on March 22, 1904, why they should not be punished as for a contempt of court. These contempt proceedings were directed against the defendants and also against the Johnstown Mining Company and Carlos Warfield and Alfred Frank, who were then in the employ of the said Johnstown Mining Company, the plaintiff in this action. The Johnstown Mining Company was not named as a defendant in the Montana suits, although the contempt proceedings in that court were directed against it. At the time the Montana suits were commenced the Johnstown Mining Company had not yet been incorporated, but at the time the contempt proceedings were instituted in the United States Circuit Court in Montana, in March, 1904, it had been incorporated under the laws of the State of New York, and claimed to own at that time an interest in the property which was the subject of the controversy in the Montana suits, through prior conveyances made to it by the Montana Ore Purchasing Company, which was a defendant in those suits. As above stated, the date of the return of the order to show cause in the contempt proceedings in the United States Circuit Court was March 22, 1904. On March 21, 1904, this action was commenced in this court. Its purpose is to secure an injunction restraining the defendants from continuing the contempt proceedings in the Federal court, and the temporary injunction, which it is now claimed the defendants have disobeyed, directed that the defendants be so restrained pending this action. While the contempt proceedings were pending before the Montana court, and on March 24, 1904, the fact was communicated to that court by plaintiff's counsel that this court had made the injunction order restraining the plaintiff in that court from continuing the prosecution of the contempt proceedings before it. The court stated that it declined to be bound by injunction proceedings in the State courts of New York, and ordered the

Digitized by Google

proceedings to continue. Said proceedings were thereupon continued until finally determined by the court on March 30, 1904, resulting in the discharge of said Carlos Warfield and in holding Alfred Frank, the Johnstown Mining Company and others guilty of contempt as charged. I am of the opinion that the defendants did not commit any contempt of this court when they continued the prosecution of the contempt proceedings before the Federal court in Montana, for the reason that the injunction order of this court, which it is claimed they disobeyed, never had any legal vitality. It was a void order, because the court had no jurisdiction to make it. The law is now well settled that a State court has no jurisdiction to enjoin actions or proceedings in a Federal court or to enjoin parties from commencing or continuing such actions or proceedings. So far as this action seeks to effect that result it is absolutely unwarranted, and the court has no jurisdiction to give the plaintiff the relief he seeks, although it may have jurisdiction of all the parties to the action. Numerous authorities might be cited to sustain this proposition, but that of Central Nat. Bank v. Stevens, 169 U. S. 432, revg. S. C., 144 N. Y. 50, is one of the most satisfactory and controlling. There Mr. Justice Shiras stated: "Those portions of the decree of the Supreme Court of New York and of the Court of Appeals which sought to compel the complainants in the suit pending in the Circuit Court of the United States to come into the state court and to there relitigate their titles to the certificates and the amounts thereof, and which sought to restrain them by injunction from proceeding under the final decree of sale of the Circuit Court, and from enforcing the other remedies adjudged to them by that decree, were, in our opinion, erroneous. * * * It will suffice to cite a few of the cases: 'It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested

Digitized by Google

or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy v. The Earl of Cassilis, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum' (Peck v. Jenness, per Mr. Justice Grier, 7 How. 612, 624)." Citing also Riggs v. Johnson County, 6 Wall. 166; Crescent City Live Stock Co. v. Butchers' Union, 120 U. S. 141; Freeman v. Howe, 24 How. 450; Buck v. Colbath, 3 Wall. 334; Rio Grande R. R. Co. v. Gomila, 132 U. S. 478. It is a mere evasion of the rule thus stated to contend that the Federal court may not be enjoined by this court, but that the litigants in that court may. It is an established and salutary principle that the law will not permit that to be done indirectly which may not be done directly. Courts have ordinarily no power to act except there be litigants before it who will start the machinery of the court into operation and keep it in motion. To enjoin litigants from proceeding in the court is in effect to enjoin the court itself. This is peculiarly so with respect to a proceeding to punish for contempt of court, that being the only method by which the court may enforce respect for its dignity and mete out punishment for the willful violation of its proper mandates. Though such a pro-

Digitized by Google

ceeding may be initiated by a litigant, it is none the less a proceeding by the court itself, having for its chief end and purpose the maintenance of its own dignity. It is urged by the plaintiffs here that they were not parties to the actions in Montana out of which the contempt proceedings in the Federal court grew, and that they were improperly made parties to those proceedings. In answer to this it may be said that this same contention was urged by the plaintiff before the Federal court, and there decided adversely to it, the court holding that the injunctions were broad enough in their terms and scope to include the plaintiff and its employees and their acts done in violation of the provisions of the injunctions. This court will respect that decision, as it should. Stevens v. Central Nat. Bank, *supra*. The injunction order of this court being void, the proceedings to punish the defendants for contempt of court for disobeying it must fall. People ex rel. Lower v. Donovan, 135 N. Y. 76.

Motion denied, with ten dollars costs.

THE CITY OF NEW YORK, Plaintiff, *v.* CHARLES F. HOLZDERBER, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Order dismissing an action to recover a personal tax levied in New York city — When it will not be granted — Meaning of the words "equitable defense."

Section 934 of the Greater New York Charter as amended by chapter 624 of the Laws of 1904 which authorizes the granting of an order dismissing an action to enforce a personal tax levied in the city of New York if the defendant has an "equitable defense" to the suit, means a defense of which a court of equity would take cognizance.

Such an order will not be granted when the moving papers simply deny that the defendant was liable to an assessment upon personal property for the year in question, and state that the defendant had never before been assessed upon personal property, that he never received any notice that the tax in question had been

Digitized by Google

assessed upon him until long after the time allowed by law to have the assessment-roll corrected, that he had no personal property subject to taxation at the time the assessment in question took effect and that his debts at that time nearly equaled the value of his personal property, but do not state that the defendant is unable to pay the tax.

ACTION to recover personal taxes assessed against the defendant for the year 1901. Motion under Laws 1904, chap. 624, amending section 934, Greater New York Charter, for an order dismissing the action.

John J. Delany, Corporation Counsel (Richard H. Clark, Jr., of counsel), for plaintiff.

Niles & Johnson, for defendant.

BLANCHARD, J. This action is brought to recover the sum of $926.33 personal taxes assessed against the defendant for the year 1901, and defendant moves, under chapter 624 of the Laws of 1904, amending section 934 of the Greater New York Charter, for an order dismissing the action, either absolutely without costs or upon the payment of costs. It was not the purpose of the Legislature, in enacting the law in question, to furnish a means for delinquent taxpayers to avoid payment of their just taxes, but it was enacted for the purpose of permitting or enabling those having an equitable defense to the assessment or payment of the tax to appear before the court and be heard on the question of what is right and fair for the court to do under the circumstances of each case. The language of the act is as follows: "The court in which any suit or proceeding may be commenced to enforce the payment of any tax for personal property, may, on motion of either party, dismiss the suit or proceedings absolutely without costs, or conditionally, upon the payment of costs, or may, on the facts, in its discretion, dismiss such suit or proceedings on the payment of such part of the tax and costs as shall be just, in any case where it shall be satisfied that the person or persons taxed are unable, for want of property, or other reason, to pay any tax or have an equitable de-

Digitized by Google

fense to such suit or proceedings." Section 934 of the Greater New York Charter was derived from section 861 of the Consolidation Act of 1882, as amended, and authorized the court upon a proceeding brought to enforce the payment of a tax for personal property to dismiss the proceeding upon the payment of such sum as in its judgment should be just "in any case where it shall be satisfied that the person or persons taxed are unable, for want of property, or other reason, to pay any tax." In City of New York v. McCaldin Bros. Co., 81 App. Div. 622; affd., on opinion below, 176 N. Y. 588, it was decided that section 934 did not apply to actions brought to recover the amount of taxes upon personal property under section 936, but was confined to a contempt proceeding instituted under section 930 of the charter. To avoid this narrow application the Legislature enacted chapter 624, Laws of 1904, amending section 934 so that it relates to a "suit" as well as to a "proceeding." In the portion of the statute already quoted the Legislature inserted the following words, "or have an equitable defense to such suit or proceeding," so that the statute now empowers the court to grant relief when for any reason the person is unable to pay the tax or has an equitable defense to the suit or proceeding. A question arises as to the meaning of the words "equitable defense." Under a familiar rule of statutory construction the Legislature is deemed to have used words which have a clear legal meaning in their technical sense, unless the context plainly indicates a different meaning. Section 507 of the Code of Civil Procedure authorizes the defendant in an action to interpose any defense he may have, either legal or equitable. It has been held under this section that the words "equitable defense" mean a defense which a court of equity would recognize, or a defense founded upon some distinct ground of equitable jurisdiction. McCreery v. Day, 119 N. Y. 1. In Susquehanna Bank v. Supervisors of Broome County, 25 N. Y. 312, Denio, Ch. J., said (p. 314). "The question has often been before the courts, and there has been a steady course of adjudication to the effect that a bill to restrain the collection of a tax would not lie, unless the case were brought within some acknowledged head of equity juris-

Digitized by Google

prudence." In 7 Encyclopædia of Pleading and Practice, 799, an equitable defense is thus defined: "An equitable defense in an action at law is a defense based upon equitable grounds; that is, grounds which, under the separate administration of law and equity, were formerly cognizable only in courts of equity." Prior to the amendment of section 934 of the charter in 1904, the Court of Appeals, in Mercantile Nat. Bank v. Mayor, in 172 N. Y. 35, discussed the jurisdiction of equity in cases involving the law of taxation. The bank alleged that its share stock was assessed at its actual value, while real estate was assessed at only a portion of its actual value, and, therefore, sought the aid of a court of equity to correct the injustice which could not be reached by a writ of certiorari. The court conceded that certiorari would not avail and that equity could be invoked when no relief could be had at law. It decided, however, upon the facts before it, that the action of the court must be based upon some well-known ground of equitable jurisdiction, such as fraud, accident or mistake. The conclusion of the court was thus expressed (p. 49): "Equity will go far to afford relief in cases of mistake; or for the prevention of fraud; or to secure to the citizen the equal protection of the laws; but it is not its province to interfere with the collection of a tax, in a case where the grievance assigned does not relate to some question of fraud, or of illegal discrimination, or classification." The amendment of 1904, in so far as it authorizes an equitable defense in a "suit" to enforce a tax, is perhaps unnecessary, since the Code already provided for such defense. But the provision is now made expressly applicable to both suits and "proceedings." In Matter of McMahon, 67 How. Pr. 113; affd., 1 How. Pr. (N. S.) 270, Mr. Justice Lawrence, in a proceeding under section 857 of the Consolidation Act, said that want of knowledge of the imposition of a tax was not a defense either legal or equitable. It would, therefore, seem that want of notice would not be a sufficient ground for relief under this section, but that it was intended to make clear the remedy of a defendant where a tax had been imposed by a mistake, resulting in illegal discrimination. It is true that the statute

Digitized by Google

is a remedial one and should be liberally construed, but there is nothing in the language used which indicates an intention to extend the meaning of the word "equitable" beyond that which the courts had given it when used in section 507 of the Code. Unless the new provisions of the charter are applied with careful consideration there is danger that the assessing officers may become lax in their efforts to ascertain the value of the taxpayer's personal property, and that the taxpayer may become careless about applying for information and relief while the books are open for correction. The result would be an increase in the amount of personal taxes likely to become uncollectible. The provisions of section 897 of the charter afford appropriate relief for persons prevented by absence or illness from making timely application to the board of taxes and assessment. It would be unfortunate if a loose construction of section 934 should extend relief to every case where an assessment was higher than it should have been. Reading the section in the light of its origin (Laws of 1867, chap. 334, § 5), the obvious purpose was to relieve from fine or imprisonment a person unable for want of property to pay any tax. As amended it applied to persons unable "for other reason" than want of property to pay any tax. Fine or imprisonment for nonpayment of taxes has been abolished (Laws of 1897, chap. 766; Laws of 1898, chap. 79), and as the law now stands the delinquent taxpayer should not be relieved unless he is unable to pay the whole or part of the tax, or has such a meritorious defense to the suit for collection that a court of equity would recognize his claim for cancellation or reduction. Defendant, in his moving papers, fails to meet such requirement of the statute as would entitle him to equitable relief. He merely denied his liability to assessment for taxes upon his personal property for the year mentioned, and alleges that, prior to said assessment, he had never been assessed upon personal property, and that his name had never appeared upon the annual record of assessed valuations on real and personal estates in the city of New York for the purpose of taxation. He also alleges that he never received any notice that he had been assessed on personal property for the year 1901, and that the first notice

Digitized by Google

he received of said assessment was a notice from the marshal received long after the time allowed by law to have said assessment-roll corrected and said assessment removed therefrom had expired. He then alleges that he had no personal property subject to taxation on the second Monday of January, 1901, and that his debts at that time nearly equalled the value of his personal property. He does not state that he is now unable to pay the tax, and the language of the act requires that the court shall be satisfied that the person or persons taxed are unable, for want of property or other reason, to pay any tax or have an equitable defense to such suit or proceeding. It thus appears that inability to pay is one of the grounds specified in the act for the intervention of the equity powers of the court. I am of the opinion that the present application should be denied, but with leave to renew on further papers.

Motion denied, with leave to renew on further papers.

MATTER OF THE APPLICATION OF CAROLINE B. MITCHELL for a Writ of Mandamus *v.* THE NORTHERN SECURITY OIL & TRANSPORTATION CO., Respondent.

(Supreme Court, New York Special Term, July, 1904.)

Inspection of the books of a foreign corporation — The New York courts cannot compel it — The remedy is in the State in which the corporation was formed — Effect of the books being out of such State.

The courts of the State of New York have not jurisdiction to grant, upon an application by a stockholder of a foreign corporation, a writ of mandamus to compel an inspection by him of the books and records of such corporation.

Such inspection is enforcible only by the courts of the State in which the corporation has its legal existence, and if the books are not within that State the corporation may be compelled to bring them therein.

MOTION for a writ of mandamus.

Digitized by Google

Franklin Bien, for petitioner.

Alexander Thain, for respondent.

BLANCHARD, J. It was distinctly held in Matter of Rappleye, 43 App. Div. 84, for an inspection of the books and records of the Farmers' Feed Company that the courts of this State have no jurisdiction to grant upon an application by a stockholder of a foreign corporation a writ of mandamus to compel an inspection by him of the books and records of such corporation, and that the right to such inspection is enforceable only by the courts of the State in which the corporation has its legal existence. An appeal was taken from such determination to the Court of Appeals, where the appeal was dismissed (161 N. Y. 615), and the law appears to be settled. In the proceeding at bar the petitioner alleges that she is a stockholder in the Northern Security Oil & Transportation Company, a corporation created by and under the laws of the State of New Jersey, and asks for a writ of mandamus permitting her to inspect the records and books of such corporation. The respondent admits that the corporation was organized under the laws of the State of New Jersey, but alleges that its business and its principal place of business, other than such as is required to be maintained in the State of New Jersey, is in the State of Texas, where the company owns its property and conducts its business in selling oil. In any event, it is a foreign corporation. The respondent also states that every book of said corporation which would throw any light upon the financial transactions of the company is in the State of Texas, and as the respondent's statement is not adequately refuted, I fail to see how the writ prayed for would benefit the petitioner. The petitioner is not without redress. She may apply to the courts of New Jersey. When a corporation of that State does business and keeps its books outside of the State it may be compelled to bring the books in for inspection of members. Huylar v. Cragin Cattle Co., 40 N. J. Eq. 392. The motion for a writ must be denied. No costs.

Motion denied, no costs.

Digitized by Google

Matter of the Application of NELLIE DAVID, to Cancel a Judgment.

(Supreme Court, New York Special Term, July, 1904.)

Motion to cancel a judgment against a bankrupt — When a statement in the bankkruptcy schedules, under the heading "residence," of the name and address of the judgment creditor's attorneys is sufficient — Fraudulent conveyance executed by the bankrupt before, but not recorded until after, the entry of a judgment against him — When the judgment creditor does not attack the conveyances until after the bankrupt's discharge, he has no lien on the real estate.

On a motion to cancel a judgment made pursuant to section 1268 of the Code of Civil Procedure which was opposed on the ground that the judgment was not properly entered in the schedules of bankruptcy, inasmuch as there was not stated therein either the residence of the judgment creditor or the fact that such residence was unknown as required by section 7 of subdivision 8 of the Bankruptcy Act, it appeared that the schedules contained the following entries: Under the heading "residence," there was the entry "c/o DeWitt, Lockman & DeWitt, attys, 88 Nassau St., N. Y. C.," and in the column containing a description of the debt, the entry "Deficiency judgment on foreclosure of mortgage entered March 13, '02."

It further appeared that the petitioner's attorney examined the city directory and found that it did not contain the name of the judgment creditor; that the verification of the complaint in the foreclosure suit stated that the plaintiff was absent from the United States, but did not disclose his whereabouts; that inquiry for the judgment creditor was made at the office of the attorneys of record, who stated that all communications for the judgment creditor should be addressed to them. It also appeared that a member of that firm was the attorney in fact for the judgment creditor.

No claim was made that the judgment creditor was not fully informed of the steps taken in the bankruptcy proceedings.

Held that under the circumstances the petitioner in the bankruptcy proceedings might, with technical truthfulness, have stated in the schedules that the judgment creditor's residence was unknown.

That, in view of the information received from the judgment creditor's attorneys, the entry made in the schedules was proper, was calculated to, and had the effect, of giving notice to the creditor.

Digitized by Google

It appeared that the judgment was docketed on March 17, 1902; that in the previous January, the petitioner executed and acknowledged certain deeds (alleged by the judgment creditor to have been executed in fraud of creditors); that in July, 1902, the deeds were recorded; that on March 20, 1903, the petitioner was adjudged a bankrupt and on June 19, 1903, received her discharge, and that no action attacking the conveyances was commenced until June 13, 1904.

Held that, under the circumstances above stated, the interest of the judgment creditor in the real estate was not, either at the time of the adjudication in bankruptcy or at the time of the discharge, of such a character that it could be regarded as a lien, and consequently embraced within the saving clause of section 1268 of the Code of Civil Procedure.

That the fact that the conveyances sought to be assailed were not recorded until after the docketing of the judgment did not exempt the creditor from the obligation of beginning an action to set them aside in order to give his interest the character of a lien.

MOTION to cancel a judgment pursuant to section 1268 of the Code of Civil Procedure.

Ralph Nathan, for motion.

Charles J. Belfer, opposed.

GIEGERICH, J. This motion to cancel a judgment pursuant to section 1268 of the Code of Civil Procedure is resisted on the ground that the judgment was not properly entered in the schedules of bankruptcy, the alleged defect consisting in a failure to state either the residence of the creditor or the fact that such residence was unknown, as required by section 7, subdivision 8, of the Bankruptcy Act. Instead of such residence or a statement that it was unknown, the schedules, under the heading "residence," contain the entry "c|o DeWitt, Lockman & DeWitt, attys, 88 Nassau St., N. Y. C.," and in the column containing a description of the debt the entry "Deficiency judgment on foreclosure of mortgage entered March 13, '02." In the replying affidavits it is asserted, and the assertion is not denied, that the petitioner's attorney, shortly before preparing her petition in

Digitized by Google

bankruptcy, examined Trow's City Directory of 1902, that then being the latest, and found it did not contain the name of the judgment creditor; and, furthermore, that the verification of the complaint in the foreclosure suit which resulted in the judgment in question, made by one of the attorneys for the creditor, stated that the plaintiff was absent from the United States, but did not disclose his whereabouts. It further appears that the petitioner's attorney also made inquiry for the creditor's address at the office of the attorneys of record in that suit and was told by them that all communications for the creditor should be addressed to them and they would receive attention. Moreover, it is not denied that a member of that firm of attorneys is at present the attorney in fact for the judgment creditor. These circumstances, I think, distinguish the case decidedly from Sutherland v. Lasher, 41 Misc. Rep. 249; affd., without opinion, 87 App. Div. 633. There it appeared that an incorrect address was given, and that the creditor in fact never had any information that the bankrupt had been discharged of his debts until the motion to cancel the judgment was made. In the present case it is significant that there is no claim whatever made that the judgment creditor was not fully informed of every step, and from the facts above stated it is obvious that he did personally receive such information or is chargeable with it through his attorneys and agents. The principal purpose of the rule under consideration is, so far as possible, to insure notice being given to creditors, and here it is plain that the petitioner's attorney used every effort in good faith to secure compliance with the spirit of the rule. Under the circumstances she might with technical truthfulness have stated in the schedules that the residence was unknown; but having received the information she had from the creditor's attorneys she very properly, as I think, made the entry she did on the schedules, which was calculated to have and apparently did have the effect of giving proper notice to the creditor and putting him in a much more favorable position than he would have been in if there had been a bald entry of "residence unknown." A further question is raised as to the right of the creditor, in the event that the motion is granted, to have a pro-

Digitized by Google

vision incorporated in the order directing the docket clerk to insert opposite the entry of the judgment a statement that the cancellation thereof should not in any way affect a lien on real property belonging to the bankrupt previous to the times she was adjudged such. Arnold v. Treviranus, 78 App. Div. 589, is an authority for a provision of this character when a lien in fact exists. It is alleged by the judgment creditor that the petitioner was, in fact, at the time of such adjudication, the owner of two pieces of real estate in the city of Brooklyn which she had fraudulently conveyed by deeds dated prior to the entry of the judgment, but not recorded until after such entry. The facts having a bearing upon the question, chronologically stated, are as follows: On January 10, 1902, the petitioner executed and acknowledged the deeds in question, which bear that date. On March 17, 1902, the judgment in question was docketed. In July, 1902, the deeds mentioned were recorded. On March 20, 1903, the petitioner was adjudicated a bankrupt, and on June 19, 1903, she received her discharge. Not until June 13, 1904, was the action attacking the conveyances commenced. In Arnold v. Treviranus, *supra*, the court, in allowing a provision similar to the one sought in this action, recognized the rule that in order to have a lien which would be protected the judgment creditor must have commenced his action before the discharge in bankruptcy, but pointed out in the case before them that such action had been commenced before the discharge. The Court of Appeals, in Ocean Nat. Bank v. Olcott, 46 N. Y. 12, discusses the question of what is necessary in order to constitute a lien within the meaning of the Bankrupt Act in effect at that time, saying (p. 17): "The bankrupt act preserves the rights of creditors by mortgage, pledge or other lien upon the property of the bankrupt, and the assignee takes the property subject to it (§§ 14, 20), and of course a valid lien against the property of a third person would not be affected by the discharge. Although there may be some apparent confusion from the use of terms, I do not think the interest of the creditors constitutes a lien, within the meaning of the bankrupt act; nor in any such legal sense as to give creditors a priority, except

Digitized by Google

by means of the usual equitable remedies. A lien is not a property in the thing itself, nor does it constitute a mere right of action for the thing. It more properly constitutes a charge upon the thing (1 Story Eq., § 506; 1 Burrill Law Dict., title 'Lien'). In some general sense, creditors have an equitable lien upon the property thus situated. So they would have, if a general liability, instead of a resulting trust had been declared. So debts are an equitable lien upon property fraudulently transferred by a debtor; and it may be said that every debtor is a trustee for his creditors, and bound to use his property for their benefit, and that creditors have an equitable lien upon the property of the debtor. But in all these cases the usual remedies are to be pursued to create and enforce the lien before a specific charge constituting an incumbrance is created;" and wound up with the conclusion that in a case either of fraudulent transfers by the debtor himself or of property paid for by him and transferred to a third person, "the commencement of an equitable action is necessary to constitute a lien or charge, in any legal sense, upon the land." Under these decisions it would seem to be established that the interest of the judgment creditor was not, either at the time of the adjudication in bankruptcy, or at the time of the discharge, of such a character that it could be regarded as a lien, and, consequently, embraced within the saving clause of section 1268 of the Code of Civil Procedure. It is true that the present case differs from Arnold v. Treviranus, *supra,* in that the conveyances sought to be assailed were not recorded until after the docketing of the judgment; but I cannot see that this circumstance exempts the creditor from the requirement of beginning an action in order to give his interest the character of a lien, it being the established law in this State that, "in the absence of fraud, a judgment takes effect only on the actual interest in land which the judgment debtor has, at the time of the recovery of the judgment, and, consequently, that the title of a grantee of the judgment debtor, by deed executed before the entry of the judgment, although unrecorded, takes precedence of the judgment. The fact that the grantee has not recorded his deed, creates no equity in favor of the judgment

Digitized by Google

creditor. The latter is not a purchaser within the recording acts, and purchasers alone are protected by those acts against unrecorded conveyances." Trenton Banking Co. v. Duncan, 86 N. Y. 221, 227; Beman v. Douglas, 1 App. Div. 169. The mere fact that the conveyances were not recorded does not affect their validity, and, therefore, it is incumbent upon the judgment creditor, if he seeks to reach the real property, to institute an action in aid of his execution, the same as though the deeds had been properly recorded before the docketing of the judgment. The motion must, therefore, be granted as prayed for, with ten dollars costs.

Motion granted, with ten dollars costs.

Matter of the Application of CHARLES P. YOUNG, for a Writ of Mandamus to be Directed to WILLIAM E. STILLINGS, CHARLES A. JACKSON and OSCAR S. BAILEY, Commissioners Appointed under and by Virtue of the Provisions of Chapter 537 of the Laws of 1893, and Continuing to Act under the Amendments to Said Act, being Chapter 567 of the Laws of 1894, and Other Acts.

(Supreme Court, New York Special Term, July, 1904.)

Stenographer of the commission created by chapter 537 of the Laws of 1893 — He is not entitled to compensation for a period during which the commission was temporarily out of existence.

Where the members of the commission created by chapter 537 of the Laws of 1893 and continued by the amendments thereof made by chapter 567 of the Laws of 1894 and chapter 729 of the Laws of 1900 and by the provisions of various court orders subsequent to the latter date resign in September, 1902, after their work had apparently been completed, the fact that the commission is revived in 1904 does not entitle the official stenographer of the commission who at the time the former commissioners resigned was serving "during the pleasure of the commission" at a salary of $3,000 per annum, to compensation for the period during which there were not any commissioners in office, and consequently no duties to be performed.

Digitized by Google

APPLICATION for a peremptory writ of mandamus.

Henry W. Herbert, for motion.

John J. Delany, Corporation Counsel (Charles L. Guy, of counsel), opposed.

GIEGERICH, J. The petitioner seeks to compel the respondents to certify to the comptroller his payroll as stenographer to the commission of which the respondents were members, the period for which compensation is thus sought extending from September 1, 1902, to April 20, 1904, the amount claimed being $4,916.66. The commission in question was created by chapter 537 of the Laws of 1893, and continued by amendments thereof made by chapter 567 of the Laws of 1894, and chapter 729 of the Laws of 1900, and by the provisions of various court orders subsequent to the latter date. The petitioner was appointed pursuant to section 5 of the original act, as stenographer to the commission, on the 5th day of June, 1893, said appointment "to continue during the pleasure of the commission," and his compensation was fixed at a stated rate per folio for the minutes taken. Subsequently, and on March 8, 1895, on the suggestion of the then comptroller of the city the relator's compensation was fixed at the rate of $3,000 per annum, which was much less than his compensation had averaged at the folio rate. There seems to have been various changes in the personnel of the commission from time to time, all of which are not very clearly set forth and probably are not important in view of the disposition I have decided to make of the case. On September 2, 1902, the then commissioners addressed a letter of resignation to the mayor, to take effect at his pleasure, which resignation, by letter dated September 12, 1902, was accepted by the mayor to take effect on the fifteenth of that month, the work of the commission being therein referred to as terminated. From that date until the 18th day of April, 1904, it is not shown that there were any commissioners in office, but it does appear that on the last-

Digitized by Google

mentioned date a regular meeting was held, and that on the 20th of April, 1904, a resolution was adopted appointing one Henderson as stenographer to the commission. The motion is resisted on the ground that compensation is sought for a period during a portion of which, at least, there were no commissioners in existence and no duties to be performed. In support of the motion it is replied that after the relator had once been appointed to the position he remained in office, notwithstanding the resignation of the commissioners, just as the attaches of a court would continue in office, although the judges might resign and their places not be at once filled. I cannot accede, however, to the argument that the relator's employment was of such a character as to constitute an office with such attributes of permanency as to entitle him, upon the facts now shown, to compensation during the period when there were no commissioners in existence, and when the work of the commission had apparently been completed, and it was not known that any further work would ever become necessary or that any successors would ever be appointed to take the places of the commissioners who resigned and went out of office in September, 1902. If no successors ever had been appointed, it could surely not be claimed that the relator would be entitled indefinitely to receive salary. The fact that subsequent events rendered necessary the revival of the functions of the commission for certain purposes ought not to have the effect of operating back and giving the relator a right which he would not have possessed had no such revival ever been made. I have, therefore, decided to deny this application, except as to the period from September 1 to September 15, 1902, without costs.

Ordered accordingly.

Digitized by Google

HARRY C. JOHNSON, Plaintiff, *v.* WILLIAM EDWIN WOODEND, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Decision by a United States court in bankruptcy proceedings that a sheriff was not entitled to poundage — It is conclusive on a motion made by the sheriff in a State court to compel the defendant's attorney to pay the poundage.

Where a sheriff holding a levy under an execution upon certain property of the judgment debtor at the time that the judgment debtor is adjudged a bankrupt applies for taxation of his poundage and charges to the United States court, which refuses to allow the former, but allows the costs and charges for keepers, the sheriff is not in a position to move before the State court out of which the execution was issued for an order for the taxation of his poundage and the payment thereof by the defendant's attorney.

In such a case, if the sheriff be aggrieved by the decision of the United States court, his remedy is by an appeal therefrom; the decision of the United States court cannot be reviewed in a State court.

MOTION made by the sheriff of New York county for an order to tax his poundage and directing the payment thereof by the defendant's attorney.

James W. Gerard, for motion.

B. Gerson Oppenheim, opposed.

GIEGERICH, J. The execution in this action was issued to the sheriff on the 29th day of April, 1904, and on the same day he levied upon certain property belonging to the defendant, which the sheriff claims was more than sufficient to satisfy the judgment, but this is denied by the plaintiff herein. On the same day, but apparently after the levy, the defendant was petitioned in bankruptcy by his creditors, and on the 14th day of May, 1904, was adjudicated a bankrupt. On the 2d day of May, 1904, the attorney for the plaintiff

Digitized by Google

served a notice upon the sheriff withdrawing the execution. This the plaintiff claims was done at the special instance and request of one of the sheriff's deputies, but this is denied by the sheriff. The issues raised by these several denials under ordinary circumstances would present very serious questions to be determined by the court, but in the view I take of this motion it will be unnecessary for me to determine any of them, as on the 2d day of May, 1904, and apparently before the withdrawal of the execution, the receiver in bankruptcy served an order on the sheriff requiring him to show cause why the possession of the property and goods levied on should not be turned over to him. In answer to this or some other motion in the Bankruptcy Court the sheriff made an affidavit containing the following allegations: "Deponent respectfully, therefore, shows that he has a lien upon the said property so attached by him and belonging to the alleged bankrupt herein of which he should not be divested, and that he should not be compelled to turn over the property of the bankrupt to the receiver in bankruptcy unless not only his costs for preserving the property incurred by him, but also his fees allowed to him by the laws and statutes of the State of New York are paid; that deponent as such sheriff as aforesaid took into his possession through said deputy said property and put keepers in charge of the same; that deponent respectfully shows that it is the law of the State of New York, as declared by the court of the highest jurisdiction, which has passed upon the question in suit, to wit, the Appellate Division of the Supreme Court; that when a sheriff has once levied upon property he is not required to deliver up that property unto any person until his fees, as well as his costs for preserving the property, are paid to him; that that has been declared and laid down in the case of Wilkinson v. Raymond in 80 Appellate Division Reports of the State of New York, at page 378;" and upon this motion he admits that he did apply to the United States court to tax his poundage and charges and that the court refused to allow the poundage, but did allow the costs and charges for keepers. It thus appears that the question of poundage and fees was presented to the United States court, which granted the ap-

Digitized by Google

plication in part and denied it in part. If the sheriff was aggrieved by such a decision his remedy was to appeal from the decision and have any error that may have been committed corrected. The present motion is in effect an attempt to review that decision in this court, which would be contrary to the well-settled rules of practice prevailing where the jurisdiction of the United States and the State courts is concurrent. The motion should, therefore, be denied. No costs.

Motion denied, no costs.

THE PEOPLE EX REL. GEORGE BLAIR, Relator, *v.* EDWARD M. GROUT, as Comptroller of the City of New York, Defendant.

(Supreme Court, New York Special Term, July, 1904.)

Civil war veterans — They are, by Laws of 1904, chap. 637, excepted from the general rule that a city official illegally removed cannot recover the salary paid to his successor before the city had knowledge that the removal was illegal — Such statute is not unconstitutional.

The general rule is that where a city official has been illegally removed and another person has been appointed in his stead, payment of the salary incident to the office to the *de facto* incumbent, prior to the receipt by the city of notice of the illegality of the removal, furnishes a complete defense to a claim for such salary on the part of the officer illegally removed.

Veterans of the War of the Rebellion have been excepted from the operation of this rule of law by chapter 637 of the Laws of 1904 which provides that a veteran of the War of the Rebellion unlawfully removed from any position held by him by appointment or employment in the State of New York, or in the several cities thereof, and who shall have been restored to such position or employment by a peremptory writ of mandamus as authorized by section 21 of the Civil Service Law "shall receive from said state or the city, county, town or village thereof under which said position or employment was held by him, the same compensation therefor from the date of such unlawful removal to the date of his said restoration to said position or employment

Digitized by Google

which he would have been entitled by law to have received in such position or employment but for such unlawful removal."

The said statute does not contravene section 10 of article VIII of the Constitution of the State of New York, which prohibits the giving of any money or property of a city to or in aid of an individual; nor does the statute violate section 9 of article V of the said Constitution, providing for appointments and promotions in the civil service of the State and all the civil divisions thereof, in that the statute relates to compensation and not to appointment or promotion and, therefore, is not authorized by the Constitution.

APPLICATION for a peremptory writ of mandamus.

Philip P. Gardiner (Asa Bird Gardiner, of counsel), for motion.

John J. Delany, Corporation Counsel (John F. O'Brien, of counsel), opposed.

GIEGERICH, J. The relator, who is a veteran of the War of the Rebellion, seeks to compel the comptroller by mandamus to pay salary claimed to be due between March 7, 1902, and February 5, 1903. On the former date the commissioner of public charities removed the relator, who subsequently obtained an order of reinstatement, which was served on the municipal authorities on the 5th day of February, 1903. Upon appeal this order was affirmed by the Appellate Division and by the Court of Appeals. The relator has been paid his salary subsequent to February 5, 1903, and the only question in issue is whether he is entitled to be paid for the interval pending his removal and the service of the order for reinstatement. It is undisputed that another filled the position during the period in question, and has received and receipted for the salary attached thereto. Under the law established in such cases payment to the *de facto* incumbent of a position prior to the notice to the municipality of the irregularity of the removal furnishes a complete defense against any claim for such salary on the part of the officer removed. McVeany v. Mayor, 80 N. Y. 185; Martin v. City of New York, 176 id. 371; Jones

Digitized by Google

v. City of Buffalo, 178 id. 45. The present application, however, does not have to be determined upon the general principle of law enunciated in the above authorities, but is covered by chapter 637 of the Laws of 1904, which provides that any veteran of the War of the Rebellion unlawfully removed from any position held by him by appointment or employment in the State of New York, or in the several cities thereof, and who shall have been restored to such position or employment by a peremptory writ of mandamus, as authorized by section 21 of the said act, "shall be entitled to receive and shall receive from said state or the city, county, town or village thereof under which said position or employment was held by him, the same compensation therefor from the date of such unlawful removal to the date of his said restoration to said position or employment which he would have been entitled by law to have received in such position or employment but for such unlawful removal, and such veteran shall be entitled to a writ of mandamus to enforce the payment thereof." On behalf of the respondent it is urged that this law is unconstitutional in that it compels the city to bestow a gratuity upon the relator contrary to article VIII, section 10, of the Constitution, which prohibits the giving of any money or property of the city to or in aid of an individual. In Bush v. Board of Supervisors, 159 N. Y. 212, it was held that the Legislature had no power under the inhibition of the constitutional provision mentioned to impose a tax for the payment of claims which there was no legal nor moral obligation to pay. The respondent, indeed, does not deny that the act would be constitutional if there were any moral obligation on the part of the city to make the payment. That there is not such a moral obligation I am unwilling to hold, where, as here, the officer has been wrongfully removed. The respondent also contends that the act in question is in violation of another section of the State Constitution, namely, article V, section 9, which provides as follows: "Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by

Digitized by Google

examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section." The argument on this point is that the act in question relates to compensation and not to appointment or promotion, and, therefore, is not authorized by the Constitution. It should be observed, however, that the Civil Service Act (Laws of 1899, chap. 370, § 21, as amd. by chap. 270, Laws of 1902) prescribes as follows: "Section 21. Power of removal limited. Every person whose rights may be in any way prejudiced contrary to any of the provisions of this section shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the state of New York or in the several cities, counties, towns or villages thereof, who is an honorably discharged soldier, sailor or marine, having served as such in the Union army or navy during the war of the rebellion, and who is an honorably discharged soldier, sailor or marine, having served as such in the volunteer army or navy of the United States during the Spanish war, or who shall have served the term required by law in the volunteer fire department of any city, town or village in the state, or who shall have been a member thereof at the time of disbandment of such volunteer fire department, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing upon due notice, upon stated charges and with the right to such employee or appointee to a review by a writ of certiorari. If the position so held by any such honorably discharged soldier, sailor or marine, or volunteer fireman shall become unnecessary or be abolished for reason of economy or otherwise, the said honorably discharged soldier, sailor or marine, or volunteer fireman holding the same shall not be discharged from the public service, but shall be transferred to any branch of the said service for duty in such position as he

Digitized by Google

may be fitted to fill receiving the same compensation therefor, and it is hereby made the duty of all persons clothed with power of appointment to make such transfer effective. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Nothing in this section shall be construed to apply to the position of private secretary, cashier or deputy of any official or department." It might be argued with equal force that such directions as to removal, retention in office and compensation are likewise outside of the permission of the portion of the State Constitution just quoted, but, nevertheless, those discriminating directions have been before the courts and have been recognized and enforced. See People ex rel. Ryan v. Wells, 86 App. Div. 270; revd., on other grounds, 176 N. Y. 462; also People ex rel. Chappel v. Lindenthal, 79 App. Div. 43; revd., on other grounds, 173 N. Y. 524. Such being the circumstances, I do not feel that a judge at Special Term should declare the act in question unconstitutional. The motion is, therefore, granted.

Motion granted.

JOSEPH E. P. LORD, Plaintiff, *v.* JULIA LORD, Individually and as Executrix, Etc., of BENJAMIN LORD, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, July, 1901.)

Bequest of more than half of a testator's estate to charity — When the widow's dower should be considered and when it should not — When parties nominated in the will do not take under the will but under a deed of trust — Rejecting portions of a will in order to uphold the remainder — When a residuary legatee may not question the validity of the trust.

In determining whether a testator had undertaken to devise more than one-half of his devisable estate to charity in contravention of chapter 360 of the Laws of 1860, the value of the widow's dower interest must be deducted from the gross value of the estate, unless she has elected to accept a provision of the will in lieu of dower, in which case, the release of the right of dower will be held to date back to the testator's death, and, in determining the pro-

Digitized by Google

portion of the estate given to charities, no deduction or allowance of the widow's dower interest from the gross estate will be made.

Where the testator uses words of bequest in his will, in giving to certain charitable organizations his estate in remainder in a trust fund, the title to which was vested in a trust company for the life of a beneficiary living at the time of the testator's death, with a provision that on the death of the life beneficiary the principal sum should revert to the testator if living, or if he should have previously died, to such person or persons as he should, by his will, direct, the charitable organizations to which such estate in remainder is given by the will take the fund not as devisees under the will, but as appointees under the deed of trust, and the value of the testator's estate in remainder will not be considered in determining the proportion of his estate devised to charities.

Where the invalid portions of an attempted bequest or devise can be expunged without essentially changing or destroying the general testamentary scheme, the valid parts of the will will be upheld; thus where the purpose of the testator, so far as it is lawful, can be carried out by expunging an invalid trust and accelerating the estate in remainder attendant thereon, this will be done.

In such a case, as the residuary estate will not be in any way augmented thereby, a residuary legatee under the will, who claims that the testator has given more than one-half of his estate to charity, in violation of the statute, has no standing in court to ask an adjudication in respect to the validity of the trust.

ACTION for the construction of a will.

J. Aspinwall Hodge (Charles M. Demond and Walter S. Logan, of counsel), for plaintiff.

Reuben Leslie Maynard, for defendant Julia Lord.

Allen & Sabine, for defendant Board of Foreign Missions of the Reformed Episcopal Church and others.

SCOTT, J. The plaintiff, as one of the next of kin and a residuary legatee under the will of his father, Benjamin Lord, deceased, brings this action for the ostensible purpose of obtaining a judicial construction of the will. A number of the defendants have, by their answers, raised the objection that the plaintiff cannot maintain the action at all, and the question is not wholly free from doubt, but since the defendants generally seem to desire that the questions raised

Digitized by Google

be determined in this action, it seems best that a decision thereon be rendered, as further litigation may thereby be avoided. The real purpose of the action is to obtain an adjudication that some of the bequests are void, in whole or in part, to the end that the residuary estate in which plaintiff is interested may be enhanced. The will itself is singularly clear and unambiguous and suggests little or no question as to the testator's intentions respecting the disposition of his property. The plaintiff's main contention is that the testator has undertaken to devise more than one-half of his devisable estate to charity in contravention of the statute, chapter 360, Laws of 1860, and this contention involves several questions which it is necessary to discuss. The first relates to the dower right of the defendant Julia Lord, the testator's widow. The value of the testator's real estate at the time of his death was $65,000, and the value of the widow's dower is found to be $7,080.66. The will made provision for the widow in lieu of dower, and she has elected to accept the provision thus made and thereby has released her claim to dower. The provision thus made for the widow consisted of the creation of a trust for her benefit during her life, with remainder over to certain charities. The plaintiff contends that in estimating the testator's devisable estate the value of the dower must be deducted from the gross estate, but that in estimating the amounts actually bequeathed the sum given in lieu of dower must be taken into account. It is unquestionably true, as a general proposition, that in determining how much a testator may lawfully give to charities the value of the widow's dower must be deducted from the gross value of the estate, because, at the time of death, the dower right is the property of the widow and not of the testator, and is, therefore, not devisable. Chamberlain v. Chamberlain, 43 N. Y. 424. Dower is, however, a right or interest in the testator's real estate which may be released by the widow, and it is deemed to be released when she accepts a provision made for her by the will and therein declared to be given in lieu of dower. In the case just cited the rule was applied where a widow refused to accept the provision made for her in the will and insisted upon her right of dower. In the present case Mrs.

Digitized by Google

Lord has, by acception of the provision of the will, released to the estate her right of dower, and this release must be held to date back to the testator's death. The reason for the rule that the value of the dower must be excluded in estimating the amount of the devisable estate, therefore, disappears, and the rule itself is rendered inapplicable, and the question must be considered as if the whole estate left by the testator, excluding his debts, but including the value of the widow's dower, was disposed of by the will. The next claim made by the plaintiff is that the estate disposed of by the will should be held to include a sum of $6,159.45, being the estimated value of the remainder in a fund of $11,000 in which the plaintiff has a life interest. It appears that in the year 1896 an action was pending in this court between the plaintiff and the testator, his father. A compromise agreement was arrived at under which plaintiff was paid a considerable sum in cash, and his father agreed to place in trust with the United States Trust Company for the benefit of plaintiff the further sum of $11,000, to be invested in specified securities, and the income thereupon to be paid to plaintiff during his lifetime. It was also agreed that if plaintiff should ever thereafter ask, claim or demand any further financial aid or support from his father the trust fund should revert to the decedent or his estate. It is not shown that this contingency ever arose. The trust deed was accordingly made, and the legal ownership of the fund and of the securities in which it was to be invested was vested in the trust company for the lifetime of plaintiff, with a provision that upon his death the principal should revert to the testator, if living, or, if he should have previously died, to such person or persons as he should by his will direct. He has by his will named certain charitable organizations to receive the principal of this trust fund upon plaintiff's death. It is true that in making this designation the testator uses words of bequest, but notwithstanding that fact I am of the opinion that the organizations named will take the fund not as devisees under the will, but as appointees under the deed of trust. It seems to be quite clear that no property or title whatever in the $11,000, or the securities in which it was invested, remained in the testator

Digitized by Google

after he had made the trust deed. All that he retained was a contingent right to a reverter, but as the contingency did not happen the title never reverted. Hence at the time of his death he owned nothing in the fund which he could devise. The case upon this point is not to be distinguished in principle from Genet v. Hunt, 113 N. Y. 158. It follows that the estimated value of the remainder in this trust fund should not be included in the testator's devisable estate, nor are the amounts to be paid to testator's appointees upon the death of the plaintiff to be treated or considered as bequests to charity. The plaintiff suggests in his complaint, and insistently argues upon his brief, that the eighth clause of the will is invalid. That clause, after reciting the fact that to carry out the provisions of the will must necessarily impose upon the executors and trustees an unusual measure of care, labor and responsibility, expresses the testator's desire to provide additional compensation for them, and to that end gives them in trust $10,000 to be invested by said executors and trustees, who are directed to pay over the income thereof to themselves "or the survivor or survivors of them in equal parts or portions during the full period required for the complete execution and fulfillment of the various provisions of this my last will and testament." It is further provided that when the estate shall have been finally wound up the fund shall be divided between and paid over to certain charitable institutions. All or nearly all of the defendants undertake to uphold this provision, and they suggest a number of ingenious and more or less plausible theories upon which the trust can be sustained. The defendants who are to receive the reversion of the fund raise no question as to the validity of the antecedent trust, and unless the plaintiff can in some way be benefited by a determination that the trust is unlawful it is not necessary in this action to pass upon its validity. In my opinion he cannot be so benefited. It is the well-settled and firmly established rule in this state that if the invalid portions of an attempted bequest or devise can be expunged without essentially changing or destroying the general testamentary scheme, the valid parts of the will should be upheld. Kalish v. Kalish, 166 N. Y. 377; Smith

Digitized by Google

v. Chesebrough, 176 id. 317. Such a condition is presented where, as in the present case, the trust which is, or is alleged to be, invalid bears no relation to the ultimate and concededly valid disposition of the principal, except that the latter is to await the determination of the former. If the trust be expunged the purpose of the testator, so far as it is lawful, can still be carried out by accelerating the remainder, and this, in my opinion, would be the only effect of an adjudication that the trust attempted to be created by the eighth clause of the will is invalid. In this view, since the principal will in no event go to the augmentation of the residuary estate, the plaintiff has no interest in the validity or invalidity of the trust, and has no standing to ask an adjudication thereon. Without attempting to make a calculation in this opinion it is sufficient to say that under the disposition herein made of the disputed question of law and upon the evidence it will appear upon a computation that the testator did not leave more than one-half of his devisable estate to charities. It follows that since plaintiff has failed to sustain any contention from which he could derive any benefit his complaint must be dismissed. It seems to be reasonably clear that, if the testator had devised too much of his estate to charities, the excess would have had to be deducted from those charitable institutions named in the residuary clause, to whom was bequeathed one-half of the residuum. These were the only defendants, therefore, to be affected by the result of the action, if the plaintiff had succeeded, since the utmost excess of charitable bequests claimed to have been made would not have amounted to a sum equal to one-half of the residuary estate. The defendant Georgie L. Buckley, while not joining with plaintiff in his attack upon the will, did not seriously combat his claims, and would have been a gainer if he had succeeded. The same is true of the defendant Benjamin Lord Buckley. Only the executor and the several charitable institutions named in the residuary clause who separately appeared and answered will, therefore, be awarded costs against the plaintiff.

Judgment accordingly.

Digitized by Google

THE INTERBOROUGH RAPID TRANSIT CO., Plaintiff, *v.* PATRICK GALLAGHER and THE CITY OF NEW YORK, Defendants.

(Supreme Court, New York Special Term, July, 1904.)

Elevated railroad in New York city — Respective rights of the city and of the railroad company in the street — Expense of underpinning the elevated structure made necessary by the building of a public comfort station — It must be borne by the railroad company, at least in the first instance — Injunctive relief denied.

A corporation operating an elevated railroad in a public street in the city of New York acquires under its charter a right somewhat in the nature of an easement for the support of its columns and structure, but does not own the fee of any part of the street, and has no exclusive right to the use and occupancy thereof.

The city still has the right to make use of the street for proper and authorized urban purposes and is not obliged to consult the mere convenience of the railroad company, or to study to save it from expense to the detriment of the public; the most that the railroad company can insist on is that its structure shall not be unreasonably interfered with.

Where pursuant to authority conferred by its charter the city, through a contractor, is constructing a "public comfort station" in the street, the building of which renders it necessary to underpin, at an expense not exceeding $2,000, three of the pillars of the elevated structure in order to secure the safety of that structure, the railroad company in the event of the refusal of the contractor to allow it to perform the work of underpinning at the expense of the contractor is not entitled to an injunction to restrain the building of the public comfort station.

Semble, that in such a case the railroad must protect its structure at its own expense.

In any event it must do so in the first instance and then, if it is ultimately decided that the expense should be borne by the city or by the contractor, it has an adequate remedy at law against them.

MOTION for an injunction.

Charles A. Gardiner, for plaintiff.

Straley, Hasbrouck & Schloeder, for defendant Gallagher.

Digitized by Google

John J. Delany, Corporation Counsel (Charles L. Guy, of counsel), for defendant City of New York.

SCOTT, J. The affidavits and documents of various kinds read upon the motion are most voluminous, but the material and important facts are simple, and for the most part undisputed. The plaintiff is the owner of a franchise to maintain and operate an elevated street railway over certain streets and avenues in the city of New York, including a public place known as Chatham Square. The plaintiff's structure at this place is upheld by iron columns, resting in the roadway, each of which is sustained by a masonry foundation about seven feet in depth, imbedded in and beneath the surface of the street. The city of New York, by the defendant Gallagher, a contractor, is erecting under the surface of said Chatham Square and in part under plaintiff's elevated railway structure a so-called "public comfort station," said structure being specially authorized by the charter of the city, the particular location being left to the discretion of certain municipal authorities. Without going into the particulars of the physical conditions thus created, it suffices for the purposes of this motion to say that the effect of excavating for the public comfort station is to render it necessary, for the assured safety of plaintiff's structure, that three of the pillars supporting the structure should be under-pinned or permanently shored up. The relief asked for by this motion is that the defendants be restrained from further proceeding with the work of constructing the public comfort station, although the weight of the evidence appears to be that the point of most imminent danger has now been passed, and that from now on, if defendants are permitted to proceed with the work, the danger will grow gradually less, yet that absolute safety to the plaintiff's structure and to the traveling public will still require that the shoring up or underpinning be done. The real controversy is as to who shall do the work, and who shall bear the cost, which according to the largest estimate put upon it will not much exceed $2,000. The plaintiff's position is that it alone can do the work of shoring up properly, and that it should be allowed to do it in

Digitized by Google

its own way and under direction of its own engineers, without regard to cost, but at the expense of the defendant Gallagher, and it has resorted to every available expedient, including actual physical force, to prevent Gallagher from undertaking to do the work of permanently under-pinning the columns. A similar motion for the same relief was made to another justice of this court, and denied by him, an appeal from his order having been taken and being now pending in the Appellate Division. A comparison of the papers used on that motion and those now before me fails to disclose any substantial or material difference in the questions involved, or in the facts presented, except that the actual imminent danger appears to be less now than it was then represented to be. The present motion might, therefore, well be denied upon the ground that it is substantially the renewal, without leave, of a motion already denied. It may not be out of place, however, to indicate briefly the reasons which suggest themselves why, even as an original proposition, the injunction should not continue. The plaintiff's position appears to be based upon an exaggerated and erroneous idea of the rights in the public highway which it acquired under its charter. Undoubtedly it did acquire certain rights of which it may not be deprived. To precisely define and limit the character and extent of those rights is not easy and, in the present case, not necessary. It may be said generally that it acquired a right, somewhat in the nature of an easement, for the support of its columns and structure, but it owns no fee in the street and no exclusive right to the use and occupancy thereof. The most that the plaintiff has the right to insist upon is that its structure shall not be unreasonably interfered with. Notwithstanding plaintiff's charter the city has still the right to make use of the streets for proper and authorized urban purposes, and is not obliged to consult the mere convenience of the plaintiff, nor to study to save it from expense to the detriment of the public. Western Union Tel. Co. v. Syracuse El. L. & P. Co., 178 N. Y. 325, 331. Undoubtedly the city would not have the right to undertake any work which would destroy the plaintiff's structure or render its use so dangerous that it must be abandoned, but no such question is presented here,

Digitized by Google

because all parties agree that the structure can readily be rendered safe at a not immoderate expense. Under a very similar state of facts it was held by the Appellate Division in the Second Department that the obligation rested upon the railway company to bear the expense of protecting its own structure. Brooklyn El. R. R. Co. v. City of Brooklyn, 2 App. Div. 98. It would serve no good purpose to quote, or to attempt to paraphrase the satisfactory reasoning by which the court arrived at that result. It is true that the excavation in that case was for a sewer, while in the present case it is a different, and in a sense more modern, at least so far as this city is concerned, public utility, but it is not different in its practical results, and not "of such a character as to destroy practically, the plaintiff's franchise and property." The case of Manhattan R. Co. v. Mayor, 89 Hun, 429, much relied upon by plaintiff, does not help its application for an injunction, but on the contrary, if it be applicable to the facts of the present case, serves only to demonstrate that an injunction is unnecessary, since adequate redress can be had at law. It appears from the papers presented that the work contracted for by the defendant Gallagher, the lines and limits of which were selected and laid down for him by the officers of the city, was of such a nature that it must of necessity imperil the safety of the plaintiff's structure. The city must, therefore, as between it and plaintiff assume whatever responsibility may follow upon the execution of the contract. It was doubtless in view of this responsibility on the part of the city that it caused to be inserted in the contract a clause known as section 19½, whereby the contractor, Gallagher, covenanted with the city that he would protect the plaintiff's structure during the performance of his contract, and make good any damage he might do. The financial ability of the city to respond in damages is not to be questioned, and I do not understand that any question is made as to the contractor's solvency. The structure can easily be made safe and at a moderate cost. The defendants have offered and now offer no obstacle or impediment to prevent the plaintiff from shoring up or under-pinning the columns. The weight of authority, in my opinion, is to the

Digitized by Google

effect that under the circumstances disclosed by the affidavits and plans it is the plaintiff's duty to protect its structure at its own expense. If this be so of course no injunction should issue. If, on the other hand, it should ultimately be determined that plaintiff was entitled to have its structure protected by the defendants or either of them, an action for damages would lie. In such an action it would doubtless be necessary to prove that Gallagher's plans were inadequate; that plaintiff's plans were the only adequate ones, and that the expense of carrying out the plans was reasonable. The plaintiff professes to be able to show all this and attempts to do so on this motion. It should, therefore, have no difficulty in proving these facts upon a trial. It appears, therefore, that if by reason of the denial of the injunction the plaintiff is driven to do the work itself, on its own plans, and, in the first instance, at its own expense, it will suffer no prejudice in the end.

Motion denied, with ten dollars costs to each defendant.

JOHN JOSEPH HAGEN, an Infant, by MICHAEL E. HAGEN, His Guardian *ad Litem*, Plaintiff, *v.* THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Defendant.

(Supreme Court, Oneida Special Term, July, 1904.)

Motion for a new trial on newly-discovered evidence — What the moving party must show — When a new trial will be ordered — An infant's rights not prejudiced by his guardian's lack of diligence — Abolition of the rule respecting cumulative evidence — Definition of impeaching evidence.

On a motion for a new trial on the ground of newly-discovered evidence, it is necessary that the moving party show that the newly-discovered evidence will probably change the result of the previous trial, that it was discovered by him since such trial and could not have been discovered by the exercise of due diligence before the trial and that it is material to the issue.

If, by reason of such newly-discovered evidence, a different outcome is probable and the jury can fairly reach another conclusion,

Digitized by Google

the court is justified in the exercise of its legal discretion in ordering a new trial.

Where the moving party is an infant of tender years it is the duty of the court to protect and guard the rights of such infant, and the failure of the guardian to prepare his ward's case for trial will not be permitted to defeat the substantial rights of the infant.

The rule which formerly obtained that a motion for a new trial on the ground of newly-discovered evidence will be denied where such evidence was cumulative has been abolished. The proper inquiry is whether the newly-discovered evidence, whether cumulative or not, is of such a character that it is likely to produce a different result on a new trial.

Evidence impeaches a witness when it assails his general credibility or otherwise weakens the force of his testimony and detracts from the weight to be given to it, without having of itself probative value as original evidence upon the matter at issue.

MOTION for a new trial upon the ground of newly-discovered evidence.

White & Ryan (William Kennedy, of counsel), for motion.

W. E. Lewis (Lewis, Watkins & Titus, of counsel), opposed.

SCRIPTURE, J. This is a motion for a new trial upon the ground of newly-discovered evidence. The motion is founded upon a case and exceptions and the affidavit of the plaintiff and the affidavits of the three new witnesses, Kellar, Heath and Finnerty. The defendant reads in opposition the affidavits of John Garvey and Thomas D. Watkins and the record of conviction of Henry Heath for assault and battery and of Thomas Finnerty for public intoxication.

The action was commenced by service of summons on July 14, 1898; complaint served August 5, 1898; answer served October 13, 1898. Plaintiff and defendant as above. There has been no change of parties in the case.

The action is one in negligence. The complaint alleges that on July 20, 1895, the defendant received the plaintiff into its cars at Frankfort for the purpose of conveying him as a passenger upon an excursion from Frankfort to Sylvan Beach and return to Mohawk and from there to Frankfort; that while the train upon which plaintiff was

Digitized by Google

proceeding easterly from Frankfort was in motion the defendant ejected the plaintiff from the cars, and as a result the plaintiff received the injuries claimed upon. The answer is a general denial and contains an allegation of contributory negligence on the part of the plaintiff.

On the 20th day of July, 1895, the Frankfort Mutual Benefit Association of the West Shore shops, which was composed of railroad men residing in and about Frankfort, in the county of Herkimer, arranged for and conducted an excursion to a place known as Sylvan Beach. For this purpose a special train was chartered by a committee duly authorized, and this train was run over and upon the defendant's road in two sections, one of which was in charge of a man by the name of John Garvey, a member of the association, selected by the defendant.

The plaintiff, Hagen, who at that time was a lad thirteen years of age, was in the employ of a firm which had bought the right to peddle refreshments upon this train, and when Garvey's section reached Frankfort, on its return from Sylvan Beach, Hagen got on board and started to walk up the steps at the west end of one of the cars. When he had reached the platform of the car, the evidence tends to show that Mr. Garvey came out of an adjoining car and ordered Hagen off, telling him that if he did not obey he would kick him off. Hagen then turned around, put both hands upon the railing of the steps, and went down to the bottom step, where he waited about fifteen seconds, more or less, with his left hand upon the railing, when, as he says, there was a sudden jerk of the cars which threw him off and he fell to the ground with his feet under the car, and was so seriously injured that it became necessary to amputate his left leg about three inches above the ankle. His right foot was also crushed, and about ten days later it became necessary to amputate that also at the middle of the instep.

At the time Hagen was thrown off in the manner above stated, the train was moving at the rate of five miles an hour, but no claim is made by the plaintiff that the defendant was negligent in any respect in the management of the train, the contention being that he was wrongfully ordered off by

Digitized by Google

Garvey, who was temporarily in charge of the train. The evidence of Garvey and the defendant's witnesses tends to show that plaintiff was not ordered off or in any way interfered with but received his injuries through his own negligence.

The first trial was before Justice Williams and a jury in May, 1899; the second before Justice Andrews and a jury in June, 1900; the third before Justice Merwin and a jury in January, 1902. The trials were held at Utica and each resulted in a disagreement of the jury.

The case was on the first day's calendar for the fourth trial at Rome, March, 1902, but owing to the severe illness of Mr. Watkins, application was made to postpone the trial until later in the term, which was granted and case set down for trial the latter part of March. Mr. Watkins not having sufficiently recovered his health, application was again made for further postponement. The court reluctantly granted the request and postponed the trial of the case to the twenty-third of April. There being no further business before the court, those of the jury who could not conveniently return in April were excused, and the term adjourned. On the twenty-third of April the courthouse was being repaired and the trial was held in my chambers, consisting of three rooms on the ground floor barely large enough to accommodate the attorneys, witnesses and jury. The jury was impaneled and the balance of the jury were discharged for the term. There was much feeling manifested in the beginning of the trial by the respective counsel, owing, I take it, to the three disagreements theretofore in the case. They were very suspicious of each other and the accusations and charges between them became very annoying and interfered somewhat with the conduct of the trial.

On the twenty-fifth of April the case was finally submitted to the jury and they retired to deliberate in the room over the chambers. The same evening they returned into court and reported that they stood ten to two but were unable to agree. They retired and again returned into court at eleven-thirty, April twenty-sixth. On that occasion I said: "I am surprised that in a case of this kind you have not been able

Digitized by Google

to agree before this time. With my knowledge of the honorable conduct on the part of all of you on this jury during the March term of court, in every case that you sat on, I am certainly surprised that in this case you cannot get together.

"This case has been tried four times. There are a great many witnesses in it. It is a very important case, and the truth of the matter should prevail.

"I do not want to have you feel as though I am hard in this matter at all by keeping you out, but I really feel it my duty to the parties in the case, and in the interest of justice, not to discharge you at this time.

"It would seem, gentlemen, that when a jury stands as it has been stated by some of your number last evening, 10 to 2, that you ought to agree.

"If there is any trouble in regard to the evidence, or in regard to the effect of admissions that may have been made, the court will be only too glad to restate the respective positions of the parties, if it can aid you in arriving at the truth and a just and honorable and decent verdict in this case.

"It is too bad that in the city of Rome, where none of these parties interested on either side reside, have nothing to do with the people here, where there should not be any influence one way or the other, it is too bad that you twelve men who have been upon a term of court lasting four weeks before this, and have agreed in all cases that have been submitted to you, and have rendered just and conscientious verdicts should disagree in this case."

One of the jurors: "You spoke about the admissions. The admissions about those boys. Of course there are some points about those admissions that some of us believe to be untrue, and some we believe are true."

The Court: "Now I will tell you in regard to admissions. Admissions should be scrutinized by you all carefully, because they are not the direct issues. In this case admissions that are favorable to the plaintiff, admissions that are favorable to the defendant, should all be scrutinized carefully, because they are not, in a sense, the main issue before you.

"With reference to the admissions or statements of a wit-

Digitized by Google

ness by the name of Slocum. There are many witnesses who have testified, and apparently respectable witnesses, that Slocum made threats in Van Dusen's coal yard, I think it was, that he was going to make a lot of money out of this case by being a witness, and that he was going to testify that he saw this man Garvey kick this boy off the train. Well, now, Slocum has been sworn, and he has not sworn to anything of that kind. All that Slocum has sworn to in reference to that, as I remember the evidence, and if there is any question about it I will have the reporter read it, is that he saw Garvey come through the car, and saw Garvey at the time he spoke to the boy, and heard Garvey tell the boy to get off. He does not swear that Garvey kicked him off, or anything of the kind. So that as far as that admission is concerned of the statement made to these people, even if he stated it just as they claimed he stated it, he did not, as a matter of fact, or has not got upon the stand and sworn to any such thing. And so it is with reference to the statements of admissions that are made by the plaintiff's witnesses, where they claim that Garvey stated that he ordered him off, and that he was sorry he did, in substance.

"You should scrutinize those carefully. They may not be as claimed by the plaintiff's witnesses. They may have misunderstood Garvey entirely on the subject, and Garvey may have misunderstood them, and he may have made no statement on the subject whatever. And so it is with the admissions made by the boy with reference as to how he was injured. In some cases he said he was jerked off or fell off or something of that kind, in the movement of the car.

"Get, if you can, right down to the meat of the case, and what was done on the car at the time that the boy received his injuries. Was Garvey on that train? Garvey said he was on the train, but Garvey says he did not see the boy. The boy says he saw him, and ordered him off. Slocum says he heard the statement made by Garvey to the boy. And another witness, Anderson, says that Garvey was there near the boy, and there is a man named Brackett who swears he heard a voice.

"Now, gentlemen, what was the truth? If Garvey ordered

Digitized by Google

that boy off, and the boy in getting off was apprehensive, and reasonably had a right to fear bodily harm if he did not get off, and in getting off, without fault on his part was injured, then, if the plaintiff was not negligent, and the boy was injured through the direct cause of the ordering off, so to speak, of Garvey, you should find a verdict in this case for the plaintiff. If Garvey did not order the boy off, or did not see the boy at all, then you should find a verdict in this case for the defendant."

Thereafter and on the same day the jury rendered a verdict for the plaintiff for $8,000 damages.

The record of this trial does not contain all of the facts and circumstances relating to the place where the trial was held or the conduct of the respective counsel from time to time, from the beginning of the trial to its close. In fact, the record would indicate that the trial justice understood how the jury were divided in their views, before they made any public announcement thereof, and the remarks of the learned court in granting a new trial in this case were justified from the record before it. I am sure if the court had all of the facts and circumstances as they actually existed before it, that a new trial would not have been granted in this case.

This case was tried in my chambers, as I have said before, and the attorneys of the respective parties exhibited much feeling and, I am sure, conducted themselves differently than they would if they had been in court during the progress of the regular term in the main courtroom. Their accusations and charges against each other were severe and vicious and it was some time before they were courteous and gentlemanly with each other. Their suspicions up to the time of the submission of the case to the jury, were in my judgment, entirely unfounded and there was no just occasion for their actions.

Practically the same witnesses were sworn on the first and second trials. On the third and fourth plaintiff swore in addition a witness by the name of Irwin Anderson and one by the name of Edward Brackett.

The case was again tried at the Rome, March term, 1903,

Digitized by Google

before me and a jury. The jury retired late in the evening and were evenly divided, but in the forenoon of the next day found a verdict for defendant.

At this trial the plaintiff swore for the first time Levi Osborn and a witness by the name of Van Epps Perigo.

On the argument of this motion for a new trial it was conceded that only one ground could be considered, to wit, for newly-discovered evidence. The plaintiff contended that the evidence of his proposed new witnesses was material and would change the result of the verdict, while the defendant contended that the witnesses were not worthy of credit and that the proposed new evidence was cumulative and that plaintiff had utterly failed to show due diligence in procuring the same.

It is essential on the part of the plaintiff to show that the new evidence will probably change the result; that he has discovered it since the trial; that he could not have discovered it by the exercise of due diligence before the trial, and that it is material to the issue.

I have no doubt the evidence proposed is material to the issue. It tends to corroborate and sustain the plaintiff's theory.

In my opinion the weight of evidence was against the verdict rendered, and this new evidence will change the result.

The plaintiff has discovered this new evidence since the trial. It is claimed he could have discovered it before the trial if he had exercised due diligence, and his excuse that he is a cripple and has three attorneys in charge of his case and supposed all of the witnesses who knew about the case were subpœnaed does not comply with the rule.

I am inclined to hold that his affidavit and the excuses made are sufficient. The plaintiff being an infant could have maintained this action after he was twenty-one years of age. Independently of plaintiff's affidavit, I believe it to be the duty of the court to protect and guard the infant's rights and especially when the infant is of tender years. In case the guardian fails to prepare his ward's case for trial the court will see to it that such neglect of duty does not defeat the substantial rights of the infant. I am not aware that the

Digitized by Google

courts have ever held that the failure of the guardian to use due diligence in procuring evidence will defeat a motion on the part of the infant for a new trial. If this were an action on the part of the father for loss of services there would be no doubt but that he would have to meet the requirements of the law and exercise due diligence before he could secure a new trial.

The question of credibility is one for the jury, and whether such new witnesses are entitled to credit or not ought not to be determined on this motion. That question belongs to the trial court.

In the disposition of this motion it will not be assumed that the witnesses speak falsely, nor will the question of their credibility be passed upon. Upington v. Keenan, 21 N. Y. Supp. 699; Phelps v. Delmore, 26 id. 279; Peyser v. Coney Island & Brooklyn R. R. Co., 81 Hun, 77.

If a different outcome is probable and the jury can fairly reach another conclusion, then the court in the exercise of its legal discretion is justified in ordering a new trial.

There is no absolute rule prescribed for the decision of motions of this kind. Each case is a law unto itself and the promotion of substantial justice is the aim in their determination. Smith v. Matthews, 21 Misc. Rep. 150, and cases cited; Holmes v. Roper, 32 N. Y. St. Repr. 470; Clark v. N. Y. C. & H. R. R. R. Co., 4 App. Div. 331; Wilcox Silver Plate Co. v. Barclay, 48 Hun, 54.

The rule which formerly obtained that where newly-discovered evidence was cumulative a motion for a new trial based thereon should be denied, has been, in furtherance of justice, virtually abolished. The proper inquiry is whether the newly-discovered evidence, whether cumulative or not, is of such a character that it is likely to produce a different result upon a new trial.

It is further urged that the motion should be denied because the evidence simply seeks to impeach the testimony of the defendant. But the evidence of the new witnesses, Kellar, Heath and Finnerty, is not impeaching evidence within the meaning of the rule. Evidence impeaches a witness when it assails his general credibility or otherwise weakens the

Digitized by Google

force of his testimony and detracts from the weight to be given it, without having of itself probative value as original evidence upon the matter at issue. Where, as here, it merely tends to show a different state of facts from that testified to by the defendant and some of the witnesses and upon which the defendant founds its defense to the action, it contradicts but does not impeach. If the rule claimed by the defendant should prevail, then no newly-discovered evidence could ever be introduced because it must necessarily, if of any consequence, contradict some witness who has sworn to the contrary. Keister v. Rankin, 34 App. Div. 288; Hess v. Sloane, 47 id. 585.

In Kring v. N. Y. C. & H. R. R. R. Co., 45 App. Div. 373, the plaintiff was a boy about eleven years of age and while a trespasser upon the defendant's railroad sustained the injuries complained of. On the trial he and two disinterested witnesses testified that he was kicked from the car by the conductor, and three disinterested witnesses testified that he jumped from the train. The verdict was for the plaintiff. The defendant moved for a new trial based on the affidavit of three witnesses. Their failure to appear at the trial was properly accounted for, and their affidavit was to the effect that plaintiff jumped from the car of his own volition. Justice McLennan, writing for the court, said: "Substantial justice is the end desired and where particular circumstances are such, the closeness of the issue and the uncertainty of correctness in the determination of that issue exists, the party moving should have an opportunity to again present the case, with the new evidence that has been brought to light."

Courts will not deny to the plaintiff a new trial unless it be consistent with the conscience, justice and the equity of the case to do so. The parties can ask nothing in the premises *as a right;* they only have a claim upon the *discretion* of the court, and this discretion should be watched with jealous care.

The court says that the issues in the Kring case are within narrow limits and it can hardly be said that the weight of evidence is with the plaintiff.

In the case at bar the weight of evidence was with the

Digitized by Google

plaintiff, and the reasons for a new trial in the Kring case exist in this case.

The particular circumstances surrounding the many trials of the case, and the disagreements of the jury, afford additional reasons why the motion should be granted.

Let an order be entered granting the plaintiff a new trial on the payment of the costs and disbursements of the last trial.

Ordered accordingly.

THE PEOPLE EX REL. ALBERT J. ADAMS, Relator, *v.* ADDISON JOHNSON, Warden, Etc., Respondent.

(Supreme Court, Westchester Special Term, July, 1904.)

Right to commutation for good behavior — It is a substantial right — Chapter 137 of the Laws of 1903, limiting the right to the case of a definite sentence, does not apply to crimes committed before its enactment — Otherwise it would be ex post facto.

Chapter 137 of the Laws of 1903, which took effect April 6, 1903, providing that commutation for good behavior may be earned only in case the convict is confined upon a definite sentence, does not apply to a case where a convict was sentenced April 17, 1903, to pay a fine and to serve a term of not less than one year nor more than one year and nine months in a State prison for an offence committed prior to the passage of the act of 1903.

A statute, which deprives a person accused of a crime of any substantial right which he possessed when the offence was committed, or, which, after that time, changes the punishment of his offence, is as to him *ex post facto* and invalid.

The right of a prisoner to earn a diminution of his term by good conduct is a substantial one of which he cannot be deprived by a law passed subsequent to the commission of the offence.

The relator, Adams, was convicted of the crime of "policy possession," in violation of section 344a of the Penal Code, at a Criminal Term of the Supreme Court, in the county of New York, held by Scott, J., in April, 1903. Upon April 17, 1903, he was sentenced to pay a fine of $1,000 and to imprisonment for not less than one year nor more than one year and nine months in a State prison.

Digitized by Google

A motion for a certificate of reasonable doubt was denied by Scott, J. (for Scott, J.'s. opinion see New York Law Journal, April 27, 1903). The judgment of conviction was subsequently affirmed by the Appellate Division (People v. Adams, 85 App. Div. 390); and subsequently by the Court of Appeals (176 N. Y. 351). The matter was taken to the Supreme Court of the United States upon a writ of error, and the judgment of conviction was there affirmed. Adams v. New York, 192 U. S. 585.

Prior to April 6, 1903, a court, in sentencing a prisoner (except in three specified cases), was required to limit the term of the sentence, so that the sentence would expire during the so-called "summer months," i. e., April, May, June, July, August, September and October. Penal Code, § 697.

In so calculating the term, the statute required the court to "limit the term of the sentence, having reference to the probability of the convict earning a reduction of his term for good behavior, as provided by Chapter 21 of the Laws of 1886, and *assuming* that such reduction will be earned." Penal Code, § 697.

Section 687a of the Penal Code, which provides for the imposition of indeterminate sentences, expressly declares that "the maximum limit of such sentence shall be so fixed as to comply with the provisions of section 697 of the Penal Code," *supra*.

Scott, J., sentenced Adams upon April 17, 1903. The possible maximum for his offense was two years. See Penal Code, § 344a. The commutation upon two years would have been four months; and, in view of that fact, a two-years' sentence would have expired in December, *i. e.*, not in a "summer month." See Penal Code, § 697. Scott, J., therefore imposed a maximum of one year and nine months, which, on its face, would have expired about January 26, 1905; but which was so calculated as to expire October 11, 1904, assuming that the defendant did not forfeit his commutation for good behavior.

Upon April 6, 1903, the Legislature passed Laws of 1903, chapter 137, which took effect immediately. This enactment amended the so-called "Commutation Law" (Laws of 1886,

Digitized by Google

chapter 21), and provided in effect that commutation for good behavior might be earned only in case the convict was confined upon a definite sentence. The date of the passage of Laws of 1903, chapter 137, was long *after* Adams' offense had been committed, but was eleven days *before* sentence was imposed upon him.

The Superintendent of State Prisons was in doubt as to whether the effect of Laws of 1903, chapter 137, was to deprive convicts, held on indeterminate sentences, of the right to earn commutation for good behavior. He accordingly submitted the matter to the Attorney General, and received an opinion, of which the following is a part: "From a perusal of the above provisions of the Code and the statute, it appears to be quite plain that persons sentenced for indeterminate sentences can earn no commutation by good behavior under the provisions of Chapter 21, Laws of 1886, as amended. This fact, taken in connection with the express direction of Section 687a of the Penal Code above quoted, that the maximum limit of such sentence shall be so fixed as to comply with the provision of law requiring a sentence to expire during the specified summer months leads me to the conclusion that in sentencing a prisoner to prison under an indeterminate sentence, such sentence must be made so that if the prisoner so confined under such indeterminate sentence should serve the maximum penalty prescribed thereby, he would be released during one of the months specified by Section 697 of the Penal Code."—Opin. of Att. Gen.

The relator, Adams, claimed that in view of the enactment of Laws of 1903, chapter 137, the Warden would refuse to release him on October 11, 1904, upon the date when his period of commutation should begin, and that the Warden would detain him during the full period of his maximum term, i. e., one year and nine months. He claimed, therefore, that the sentence would not expire during the "summer months," and that it was, therefore, illegal, and in violation of the provisions of section 697 of the Penal Code.

The People, in answer to the writ, claimed that Laws of 1903, chapter 137, had no application to Adams' case, as his offense was committed long before its passage; and that

Digitized by Google

if Adams' case could be deemed to be contemplated by Laws of 1903, chapter 137, then Laws of 1903, chapter 137, was *ex post facto* and void in so far as it affected offenses committed before its passage.

The application in this case, as appears by the opinion, was argued, and a decision was handed down sustaining the writ. Upon application of the People a re-argument was granted; and upon further consideration the writ was dismissed and the prisoner remanded.

In his first decision, sustaining the writ, Keogh, J., decided that the prisoner should not be discharged, but should be remanded to the sheriff of the county of New York, to be taken again before the Criminal Term of the Supreme Court for re-sentence.

After this first decision was rendered, the relator made an incidental application to be admitted to bail until he could be brought before the Criminal Term. This application was denied, as appears by the closing words of the opinion.

Benjamin F. Tracy, L. Laflin Kellogg and Abram J. Rose, for relator.

Robert C. Taylor and Henry G. Gray, assistant district attorneys, for respondent.

KEOGH, J. The offense of which the relator was convicted was committed by him in 1901. He was sentenced on the 17th of April, 1903, to pay a fine and to a term of not less than one year nor more than one year and nine months imprisonment in a State prison. This was an indeterminate sentence. It is the law that the term of a sentence imposed upon any person convicted of a crime must be so limited as to expire during the months of April, May, June, July, August, September or October. It was also the law of this State at the time the relator committed the offense that any person confined in a State prison on conviction of a felony, where the term equals one year, may earn for himself a commutation of his sentence of two months for the first year, and two months for the second year.

After the commission of the offense by the relator, and

Digitized by Google

before his sentence on April 17, 1903, there was enacted chapter 137 of the Laws of 1903, which went into effect on the sixth of April of the same year.

The effect of this law was to deprive convicts confined under an indeterminate sentence of the right to earn a commutation. It is claimed by the prisoner's counsel that this law is applicable to him, while the district attorney contends that it is *ex post facto* as to the relator because his offense was committed before its passage. On the previous argument the district attorney conceded that the law was not *ex post facto* as to the relator, so that that question was not then presented for decision. If the law of 1903 applies to the defendant, then he is entitled to no commutation whatever, and his sentence of one year and nine months will expire in January, 1905, which is contrary to law. This illegality in the expiration of the prisoner's term during a winter month, it is contended by his counsel, makes void the whole sentence of imprisonment, and entitles the relator to an immediate discharge.

If, however, the law of 1903 is not applicable to the relator, then he is entitled to a commutation under the law as it existed when he committed the offense, and such commutation of his sentence will end his term in the month of October in conformity to the law.

It is the settled law of this State, that a statute which deprives the accused of any substantial right which he possessed when the offense was committed or which after that time changes the punishment of his offense, is as to him *ex post facto*.

If the prisoner had been tried and sentenced at any time after December, 1901, when the offense was committed and before April 6, 1903, when the law took effect, it must be conceded that he would have been entitled to a commutation of his sentence for good conduct in States prison. Such a right to earn a diminution of his term by his own act is a substantial one, of which by a law passed subsequent to the commission of the offense he cannot be deprived. Murphy v. Commonwealth, 172 Mass. 264; Hartung v. People, 22 N. Y. 105, 106.

Digitized by Google

The commanding judicial decisions by which statutes providing for the punishment of crime have been construed, have treated such laws as intended to deal with future offenses and not to fit past ones. Any other rule would afford opportunity and temptation under one guise or another for the enactment of laws by which the punishment of some special offense or special offendor might be changed after the crime was committed, which would necessarily lead to intolerable discrimination and oppression.

It is the law that existed when the offense was committed that Adams has violated, and it is the punishment for such offense as declared by that law that he should receive.

The sentence imposed by Mr. Justice Scott under the law as it existed when the offense was committed was legal, and the commutation to which he is entitled will cause his term to expire in October in accordance with law.

The writ is dismissed, and the application for stay and bail denied.

Writ dismissed and application for stay and bail denied.

GEORGE H. HEIDLINGER, Plaintiff, *v.* THE ONWARD CONSTRUCTION CO., Defendant.

(Supreme Court, Kings Trial Term, August, 1904.)

Arbitrator — His determination is binding in the absence of fraud or mistake — Errors of law or of fact do not affect the award — Failure of the arbitrator to determine a matter left to him — An architect may determine whether a contract has been completed without taking testimony — Effect of one part of a several award being void — Action on a contract containing an arbitration clause.

Where parties have selected an arbitrator who is to determine the questions that arise during the performance of a contract entered into by them and upon whose certificate payments are to be made and it is provided in the contract that the determination of such arbitrator is to be binding upon the parties thereto, his determination is a condition precedent to the right of either

Digitized by Google

party to recover under the contract, and, in the absence of fraud or palpable mistake, his certificate is final.

In the absence of proof of corruption, bad faith or misconduct on the part of the arbitrator or palpable mistake appearing on the face of the award, neither party will be allowed to prove that the arbitrator decided wrongly as to the law or the facts.

Where no adjudication has been made by the arbitrator upon a matter left to his determination, the matter will not be passed upon by the courts, in the absence of proof of unreasonableness or fraud on the part of the arbitrator.

In reaching a determination as to whether a binding contract has been completed, the owner's architect, who by the terms of the contract has been made the arbitrator between the parties, is not obliged to take the testimony of witnesses.

Where the award or certificate of an arbitrator is several, and a part of it is void, if that part is not so connected with the rest of it as to affect the justice of the case, the award is void only *pro tanto*.

A provision for arbitration contained in a contract is not a defense to an action brought on the contract, where no demand or request for arbitration was made until the trial.

ACTION upon contract. Facts, other than those set forth in this opinion, appear in the decision filed herewith.

Field & Chittenden, for plaintiff.

Cowing, White & Wait, Hastings & Gleason and Fisher & Fisher (Ernest Hall, of counsel), for defendant.

HERRICK, J. This case turns upon the sufficiency and effect of an architect's certificate and the circumstances under which it was given.

"It is now too well settled in this State to be questioned that where the parties have selected an arbitrator, who is to determine the questions that arise during the performance of the contract, and upon whose certificate the payments are to be made, and it is provided in the contract that the determination of such arbitrator is to be binding upon them, his determination is a condition precedent to the right of either party to recover under the contract; and that, in the absence

Digitized by Google

of fraud or palpable mistake, his certificate is final." Del Genovese v. Third Ave. R. R. Co., 13 App. Div. 412.

"A valid award or estimate operates as a final and conclusive judgment, and however disappointing it may be, the parties must abide by it. * * * It is well settled that while an award may be set aside for a palpable mistake of fact in the nature of a clerical error, such as a miscalculation of figures, still, in general, such mistake, to be available, must appear on the face of the award or in some paper delivered with it. * * * In the absence of proof of corruption, bad faith or misconduct on his part or palpable mistake appearing on the face of the estimate, neither party can be allowed to prove that he decided wrong as to the law or facts." Sweet v. Morrison, 116 N. Y. 19.

"The award of an arbitrator cannot be set aside for mere error of judgment as to the law or facts of the case submitted to him. If, in making his award, he keeps it within his jurisdiction and is not guilty of fraud, corruption or other misconduct affecting his award, then his award is unassailable." Masury v. Whiton, 111 N. Y. 679.

"The conclusiveness of awards is based upon the principle that the parties having chosen judges of their own and agreed to abide by their decision, they are bound by their agreement and compelled to perform the award." Matter of Wilkins, 169 N. Y. 494–499.

By the provisions of the contract in this case the architect of the defendant was made the arbitrator between the parties, subject to an appeal to three arbitrators in the manner provided for in the contract.

The contract here provides for the giving of a final certificate by the architect.

It provides that no alteration shall be made in the work called for by the contract and specifications, except by the written order of the owner, and when so made the value of the work added or omitted shall be computed by the architect, and added to or deducted from the contract price.

There is also a provision in the contract that the owner shall pay any damage to the contractor caused by the owner delaying the material progress of the work, and that the con-

Digitized by Google

tractor shall pay any damage that the owner shall suffer because of any delay to the material progress of the work caused by the contractor, and that the amount of such damage suffered by either party shall in every case be fixed and determined by the architect. There are also provisions as to the appointment of arbitrators when either party is dissatisfied with the determination of the architect upon any of these matters.

As to the determination of the architect of the value of added or omitted work, which shall be added to or deducted from the contract price, the value of such work necessarily has to be passed upon separately, and a separate certificate of determination is proper although not perhaps necessary. In the event of a separate certificate being made then another would be made of the balance due upon the contract as such, and the amount of the one added to or deducted from the other. Or there may be a determination and certificate of the balance due upon the contract, which shall in fact include the value of the work added to or omitted from the contract price, although not separately stated as such in the determination and certificate. So also as to the damages caused by the delay, either of the contractor or of the owner, it is obvious that there may be a separate determination and certificate as to each of them, or there may be a certificate of determination which simply sets forth the balance due to either on account of such damages.

A certificate upon any one of these subjects upon which the architect is empowered to pass is final, unless appealed from to arbitrators, as provided for in the contract. If there has been no determination made or certificate given upon or for any matter left to his determination, then as to such matters the parties should be precluded from litigating them here; they have by their conduct agreed upon the court to pass upon such matters, and unless it has unreasonably or corruptly passed upon or refused to pass upon them, they are not excused for the nonproduction of its certificate of determination.

If there has been no determination made or certificate given upon any matter left to the determination of the court

Digitized by Google

agreed upon, then unless that lack of determination or furnishing of a certificate thereof is attributable to the unreasonableness or fraud of such court, such matter should not be passed upon here.

In this case the certificate of the architect embodied a determination of three things, all of which he was empowered to determine by the contract:

First. The fact that the contract was completed.

Second. The amount due upon the contract, not determining or certifying, however, the value of added or omitted work caused by alterations to the contract.

Third. The damages suffered by the plaintiff because of delays caused by the defendant. The schedule of damages affixed to the certificate shows that this was made up entirely and exclusively of the plaintiff's damages, no deduction being made therefrom of damages suffered by the defendant caused by the plaintiff's action.

The defendant seeks to impeach the validity of this certificate in all particulars, because, as he says, he was not heard upon these questions, and the architect passed upon them without considering his claims; that he had a large number of men at work going through the building, making an examination of the work done, and that they had not completed that examination at the time the architect gave his certificate.

While not necessary, it is perhaps well to consider briefly the justice of these complaints. The contract requires that payment shall be made thirty days after the completion of the contract.

The specifications, which are made a part of the contract, provide that when the work is completed, the contractor shall notify the defendant or its agent that he is ready to receive a settlement, so that if it has any bills to file or statements to make, it can do so, before the architect makes his final certificate.

On the 7th of February, 1903, the contractor notified the defendant that it was "ready to receive a settlement, so that you can file any bills or statements which you have to make with the architect at once." This request was repeated in letters dated March twenty-eighth and April sixth, thir-

Digitized by Google

teenth and twenty-seventh. And although the architect certified that the contract was completed February twenty-eighth, he did not grant his certificate thereof until May sixth.

The defendant apparently expected to make use of the persons who were in its employ, investigating the work and materials that had been done and provided in the building, as witnesses before the architect as to the completion of the contract, and complains that the certificate was given before it had completed its examination.

In reaching a determination as to whether the contract had been completed, it was not the duty of the architect to take the evidence of witnesses. Sweet v. Morrison, 116 N. Y. 19, 30, 31. His skill and experience as an architect had been relied upon by both parties to the contract to determine whether it had been fully and properly performed. The contract made his decision final as to the quality of any material or labor furnished by the contractor; and also provided that the work under the contract should be done under his direction and to his satisfaction. He was the architect in charge of the work and visited it daily, and knew whether it had been completed according to the contract, and I can see no necessity for the delay from February seventh, when the contractor claimed it had completed it, or from February twenty-eighth, when the architect says it completed it, until May sixth, when the architect issued his certificate.

As to the amount due, I can see no reason for delay. The contract prices under the several contracts were set forth in the recapitulation contained in the contract of May fifth; the amount of payments made was readily ascertainable. The only thing remaining was the value of added or omitted work caused by alterations in the contract. For any such alterations there must have been a written order. They were matters of record, and it was the duty of the architect to compute the value. This did not require any assistance from the defendant or require the labor of a corps of investigators or examiners for weeks and months to ascertain the facts in order that they might be presented to the architect.

The character of the investigations which were being made by the defendant, and which it complains it had not time to

Digitized by Google

complete before the certificate was given, should perhaps be adverted to.

The letters and oral evidence of Mr. Stokes, the real defendant in this case, who was the treasurer and manager of the defendant, show that he was making a very minute examination of the work done and the materials supplied by the Vinton Company, but not as to the work added or omitted because of alterations made in the contract or of the damage caused by delay.

As to the character of the work done and the materials furnished I have already discussed the question as to who was to determine that, and how; also the question of additional or omitted work.

As to the claim of the Vinton Company for damages for delay, as provided for in the contract, neither the oral testimony of Mr. Stokes nor the documentary evidence in the case shows that he was making any effort to investigate that matter and prepare a statement in that respect.

The contractor had filed an itemized claim for damages with the architect in February, 1903, the defendant had undoubtedly seen it and taken legal advice upon it, and apparently determined to disregard the authority of the architect to pass upon that question.

A flood of light is thrown upon the position of the defendant and upon its investigations and efforts to ascertain the amount of its claim by the letter of Mr. Stokes to Mr. Duboy, the architect, May fifth, being the day before the architect gave his certificate. That letter, among other things, shows that the architect had been furnished by the contractor with its estimate of what allowances the defendant was entitled to, and that from that the architect and his assistant made calculations, which the architect then had. The letter also shows that the defendant, instead of intending to rely upon the determination of the architect or make any claim before him as to the amount of damages, if any, that the contractor was entitled to because of delays, had already taken legal advice as to its liability, and had been advised that no damages could be recovered.

To sum it all up, the defendant seems to have been in-

Digitized by Google

vestigating only those matters which were peculiarly within the knowledge of its architect, and as to which his decision was final, and upon which he was necessarily passing judgment from day to day as the work progressed; and of the question that did not require expert knowledge to pass upon, that of damages for delay, he was making no investigation, no claim; relying not upon the agreed arbitrator, but upon legal advice that nothing could be recovered from it in that behalf.

It seems to me, therefore, that the complaint of the defendant that it had not time to prepare its case for the architect, and that it was not heard by him, is unfounded and unreasonable. The architect represented the defendant and was its agent, and had knowledge of all the facts as to which the defendant claims it desired to inform him.

I think that the delay, both of the defendant and the architect, was unreasonable. As to the certificate itself, its sufficiency is challenged by the defendant. The certificate of the architect was to three things, each one capable of being separated from the other, and as before stated, each of those things was a matter upon which he was authorized by the contract to pass.

First. He certifies to the fact that the contract was completed February 28, 1903.

Second. That the "Vinton Company is entitled to the final payment, amounting to $20,422.17, subject to such deduction for allowances for work omitted at the rates as provided for in the contract, still to be submitted by the owner, as may be approved by me as architect."

Third. As to the amount of damages for the delay caused by the owner, as provided for in the original contract.

Where an award or certificate is several, and a part of it is void, if that part is not so connected with the rest as to affect the justice of the case, the award is void only *pro tanto.* Herbst v. Hagenaers, 137 N. Y. 290.

The first and third parts of the certificate, as above divided, are, I think, sufficient certificates, and are conclusive and binding upon the parties to the contract. The second may be insufficient, that is, no certain amount is found in it.

Digitized by Google

It leaves something for future determination. "An award must be certain or it is void." Fallon v. Kelehar, 16 Hun, 266.

Assuming that the certificate as to the amount due upon the completion of the contract is insufficient, the plaintiff is not precluded from recovering the balance due upon the contract because he does not produce a proper and sufficient certificate of the architect:

First. Because he has produced the only one he could, the only one the architect would give the contractor, and the plaintiff cannot be precluded by the improper or faulty act of the architect. It is a certificate of the balance due upon the contracts as such, but without a certificate or computation of the deduction therefrom, to which the defendant was entitled for omitted work. It is a certificate of the Vinton Company's claim under the contracts, and the amount due upon such contracts.

Second. Because the defendant's failure to submit his claim to the architect caused the defect in it.

Third. Because the defendant's discharge of the architect prevents his further acting for and between the contracting parties, and granting a proper certificate.

The contract being completed, it followed that the contractor was entitled to the contract price. Any deduction for omitted work was in the nature of an offset or counterclaim to be deducted from the contract price. The amount of it was to be determined by the architect.

As we have before seen that determination might be made separately and evidenced by a written certificate as to the amount, or it might be embodied in the certificate of the balance due the contractor, although not separately stated in such certificate. If it was anything coming to the contractor, it was his business to procure the certificate or determination. If it was coming to the owner it was his business to produce the certificate or determination. The defendant has failed to produce such certificate as to the amount due him for omitted work, and not having such certificate or determination of the architect of the amount due him, he cannot deduct it from the contract price.

Digitized by Google

The requirement of a certificate of the architect is binding upon both parties to establish their claims. The failure of the plaintiff, if it is a failure, to produce one to establish his claim, was excusable, because of the reasons heretofore stated, and, therefore, his recovery is not precluded for lack of a sufficient certificate. The default of the defendant to produce a certificate is because of his own conduct and neglect, and not excusable.

The claim that the matter should be submitted to arbitrators was not made until during the trial of the action, and in the absence of any demand or request being made for, or steps taken to secure, arbitrators by the defendant under the contract, the provisions in the contract for arbitration constitute no defense to the action. Smith v. Alker, 102 N. Y. 87.

From these views it follows that the plaintiff is entitled to recover as directed in the decision filed herewith.

Judgment for plaintiff.

AMELIA KORMAN, by Committee, Etc., Plaintiff, *v.* THE GRAND LODGE OF THE INDEPENDENT ORDER FREE SONS OF ISRAEL OF THE UNITED STATES, Etc., Defendant.

(Supreme Court, New York Trial Term, August, 1904.)

Judgment in personam and judgment in rem — Personal service or an appearance is necessary in the first and constructive service is sufficient in the second — A summons will not justify a judgment by default in favor of one not named therein — Recitals as to appearance by an attorney — Proof as to his authority.

A judgment *in personam* cannot be rendered without personal service of notice upon the defendant or his voluntary appearance.

A judgment *in rem*, however, may, where the *res* is present within the jurisdiction, be rendered without any other notice to the defendant than such constructive service of process as the local law may prescribe.

A summons giving notice of a definite claim asserted by a designated plaintiff will not support the rendition against the defendant, who did not appear, of a judgment *in personam* upon an additional claim in favor of another person not named therein.

Digitized by Google

A recital in a judgment that the judgment debtor appeared by a certain attorney is conclusive as to the fact of the attorney's appearance, but the question of the attorney's authority to make the appearance is open to proof on behalf of the judgment debtor wherever an attempt is made to enforce the judgment.

ACTION upon a judgment rendered by the District Court of Leavenworth county, Kansas.

Tried without a jury by consent.

William R. Page, for plaintiff.

J. Orlando Harrison, for defendant.

BISCHOFF, J. The judgment in favor of this plaintiff was rendered by the Kansas court in the course of a litigation instituted by one Esther R. Lyons to recover $500 upon a benefit certificate issued by the defendant, an incorporated mutual benefit association, through a local branch, known as "Kansas Lodge No. 72 of the Independent Order Free Sons of Israel."

Service of the summons in the action thus commenced was made upon the local lodge, the then named defendant, but afterward an amendment was sought, and granted, for the purpose of substituting the real defendant intended — the corporation — and a new summons was issued, with service upon the president of the local lodge, entitled in substance as against the defendant corporation and one Mollie Berlan for a claim of $500 and interest.

While some question is presented as to the sufficiency of this attempted service upon the corporation, I may assume it to have been sufficient for the purpose of giving the court jurisdiction of the defendant in the then described action, and pass to the subsequent proceedings out of which the present plaintiff's claim arises.

This summons apprised the defendant of the claim of Esther R. Lyons for a certain sum of money, and the defendant suffered a default of appearance. Thereafter, without further notice, or the service upon the defendant of some

Digitized by Google

pleading in her behalf, which might amount to notice, the present plaintiff was brought in as a party and obtained judgment for $500, the original plaintiff being awarded a like amount. It is here that the jurisdictional defect in the proceedings, as between this plaintiff and defendant, becomes apparent.

For the purposes of a judgment *in personam,* personal service of notice upon the defendant in order that he may have his day in court, is essential. Without this notice no court can proceed to render an enforceable judgment, unless the party to be affected voluntarily appears and submits to the jurisdiction. It is otherwise, of course, with a judgment *in rem,* where the court may deal with the *res* present within the jurisdiction with no notice to the defendant other than such constructive service of process as the local law may prescribe. Pennoyer v. Neff, 95 U. S. 714.

Personal notice being the basis of the jurisdiction to render a judgment *in personam* (Black Judg., § 220), it is apparent that the summons which gives notice of a definite claim, asserted by a designated plaintiff, cannot suffice to support a judgment upon an additional claim in favor of somebody else, without an appearance by the defendant. The disclosed claim may be recognized by the defendant as just and not open to a defense, but if such a summons be viewed as giving jurisdiction to the court to adjudicate upon the claims of any asserted creditors of the defendant within the jurisdiction, its character, as a means of notice, would be entirely gone.

The form of the summons is a matter upon which the jurisdiction depends, so far as a question may arise whether the form is substantially sufficient to apprise the party of everything which he is then entitled to know (Black Judg., § 223), and a summons which names one person as the plaintiff cannot support a judgment in favor of another, where the defendant is in default. Cantrell v. Fowler, 24 S. C. 424.

The judgment in suit recites the appearance of the local lodge or agency, which, of course, was not this defendant, and, so far as there is a recital in the interlocutory judgment

Digitized by Google

of an appearance of the defendant "by H. Markson, its attorney," any consent to the litigation of the present plaintiff's claim at that time, as implied from this recital, depends upon the fact of the attorney's authority to appear. While the judgment concludes the question of the attorney's appearance, the question of his authority to make the appearance is open to proof on behalf of the defendant wherever the judgment is sought to be availed of (Black Judg., § 903), and the uncontradicted evidence — the testimony of the attorney named — is that there was no authority for any appearance by him in behalf of this defendant.

There should, accordingly, be judgment for the dismissal of the complaint upon the merits.

Complaint dismissed upon the merits.

THE UNITED GOLD AND PLATINUM MINES CO., Plaintiff, v. CHARLES E. W. SMITH, Defendant.

(Supreme Court, New York Special Term, August, 1904.)

Corporation — Right of one who as trustee and proxy of a majority of the stockholders votes that stock be issued to himself — Property of the corporation acquired by such means by him will be adjudged to belong to it.

The American Gold and Platinum Mines Company and the Consolidated Gold and Copper Mines Company consolidated and formed the United Gold and Platinum Mines Company. At the time of the merger, one Smith held a majority of the capital stock of each of the constitutent companies as general trustee for all the stockholders and he voted this stock, together with other stock owned by him individually, and stock belonging to persons from whom he had proxies, in favor of the consolidation.

At the meeting of the stockholders of the American Company, at which the merger was approved, a resolution was passed reciting the rendition by Smith of certain valuable services to the company and of the fact that the corporation was indebted to him in the sum of $25,000 for money advanced and directing the issuance to Smith, out of the stock set aside for treasury purposes, of $1,300,000 in

Digitized by Google

stock. The stock called for by the resolution was not issued to Smith by the American Company, but, after the organization of The United Gold and Platinum Mines Company, 130,000 shares of its stock were issued to him as the equivalent for the stock of the American Company to which he claimed to be entitled by virtue of the above resolution. Such resolution could not have been passed without Smith's vote.

The meeting at which the resolution was passed was a special meeting and the notice thereof stated that it was "for the purpose of considering a plan of amalgamating the interests of properties of this company (the American Company) with that of the Consolidated Gold and Copper Mines Company, and for such other business in relation thereto, as well as the general business of the company, as may be presented to the meeting."

In an action brought by the United Gold and Platinum Mines Company against Smith to compel the latter to return the stock in question to its treasurer, it was

Held, that the resolution of the American Company directing the issuance of the stock to Smith could not be sustained, for the reasons, first, that it was passed for the personal benefit and advantage of the defendant, by the controlling vote of the defendant himself, while he was a director and an officer of the company and trustee and proxy for nearly all the stockholders; second, that the notice of the meeting was not sufficient to give the stockholders any intimation that such a resolution as the one in question would come before the meeting, and third, that the issue of the stock to Smith was not authorized by any provision of the merger agreement and was not ratified at any subsequent meeting of the stockholders of either of the constituent companies or of the plaintiff.

At a meeting of the directors of the American Company held June 16, 1902, subsequent to the approval of the merger agreement, a resolution was adopted authorizing the issuing, for the purpose of meeting the daily financial obligations of the company, of twenty $1,000 notes of the company, each note to carry as a bonus 500 shares of the company's stock. On January 3, 1903, after twelve of these notes had been negotiated and while eight of them were still in the possession of the American Company, the executive committee of the plaintiff passed a resolution authorizing the substitution of its notes in renewal of or in place of the twenty notes of the American Company which had then matured and also attaching an additional bonus of 500 shares of stock to each of the notes, making the total bonus with each note 1,000 shares of the plaintiff's stock.

September 13, 1902, the board of directors of the plaintiff passed a resolution reciting an indebtedness due to Smith from the American Company and from the consolidated company and providing "That notes of $1,000 each, dated the twenty-sixth day of June,

Digitized by Google

and payable six months after date, shall be made payable to the order of Charles E. W. Smith to cover said indebtedness, each note to be accompanied by a certificate of 500 shares of the preferred stock of the United Gold and Platinum Mines Company. * * * said notes to be similar to the notes heretofore issued by the A. G. & P. M. Co."

The notes of the plaintiff called for by the latter resolution were not issued to Smith, but it appeared that he took over to himself eight of the original notes of the American Company.

Held, that the plaintiff was the owner of such eight notes and of the renewals thereof and of the shares of stock of the plaintiff attached thereto as a bonus;

That said original notes were issued for the purpose of raising money to meet the financial obligations of the American Company, and not for the purpose of paying an indebtedness due to Smith;

That the resolution adopted by the directors of the plaintiff on September 13, 1902, related to notes of the plaintiff and did not entitle Smith to any of the original notes issued by the American Company or to the renewals thereof.

ACTION by plaintiff, a corporation, to set aside as invalid an issue of stock to defendant and a demand that defendant retransfer and return the stock to its treasury.

Hardy & Shellabarger, for plaintiff.

H. D. Luce (John J. Adams, of counsel), for defendant.

BLANCHARD, J. The facts of this case are as follows: The plaintiff is an Arizona corporation, and was formed out of the consolidation or merger of two pre-existing Arizona corporations, viz., the American Gold and Platinum Mines Company (which will be referred to as the American Company) and the Consolidated Gold and Copper Mines Company (which will be referred to as the Consolidated Company). The defendant Smith, at the time of the merger, held as trustee for the stockholders of the constituent companies the majority of the capital stock, with the right to vote upon said stock, and he thus had the controlling interest in the management of the affairs of the constituent companies. The merger agreement was approved by the American Company at a special meeting of the stockholders held

Digitized by Google

May 12, 1902. At this meeting 736,200 shares were voted upon out of a total capitalization of 1,000,000 shares, and of the shares voted 665,190 shares were voted by the defendant Smith as follows: 501,000 shares held by him as general trustee for all the stockholders, 114,960 shares owned by him individually, and 50,230 shares voted on by him as proxy for other stockholders. The Consolidated Company approved this merger agreement at a stockholders' meeting held April 18, 1902, at which meeting 946 shares were voted upon by the defendant Smith out of a total capitalization of 1,000 shares, as follows: 501 shares held by him as general trustee for all the stockholders, 123 shares owned by him individually, and 322 shares voted on by him as proxy for other stockholders. It is conceded that the merger agreement was passed upon and approved by the stockholders of both constituent companies. This agreement provided for the acquisition by the plaintiff company of the property and assets of the constituent companies, and payment therefor by the issue of stock of the plaintiff to the stockholders of the constituent companies on a *pro rata* basis. It contains the following provisions which affect particularly the issues in this action: "Five million and ten thousand dollars ($5,010,000) of the common stock of the United Company shall be issued to Charles E. W. Smith, trustee, in payment for five million and ten thousand dollars ($5,010,000) of the common stock of the American Company now held by him as trustee. The stock of the United Company appropriated for the purchase of the properties of the Consolidated Company shall be issued in the following manner: Five million and ten thousand dollars ($5,010,000) will be issued to Charles E. W. Smith, trustee, in payment for five hundred and one (501) shares now held by him of the Consolidated Company. One million two hundred and forty-five thousand dollars ($1,245,000) common stock and one million and fifty thousand dollars ($1,050,000) preferred stock shall also be issued to Charles E. W. Smith, trustee, for the treasury purposes of the said United Company. The ten million and twenty thousand dollars ($10,020,000) of common stock of the United Company to be received by Charles E. W. Smith, as trustee,

Digitized by Google

under the above stated provisions, shall be held by him to be used for the purposes of the treasury of said United Company, or, if he shall in his discretion determine otherwise then for such other use in the interest of said United Company or of its stockholders, as he may in his absolute discretion deem to be the best." In the minutes of this meeting of the stockholders of the American Company held May 12, 1902, the following resolution appears: "Whereas, This company is indebted to Chas. E. W. Smith for valuable services rendered from time to time in the way of negotiating and providing financial aid for the company; and whereas, this corporation is indebted to Chas. E. W. Smith in the sum of about $25,000 for cash advanced; and whereas, the said corporation recognizes the value of the services rendered by said Chas. E. W. Smith in providing financial aid in the manner aforesaid; and whereas, this corporation desires that the said Chas. E. W. Smith shall carry for the company the said indebtedness up to the 1st of July, 1902; and whereas, the said company is desirous that the said Chas. E. W. Smith shall continue to take care of the company's affairs as he has heretofore done; now, therefore, be it resolved, that in consideration of all the aforesaid, we, the stockholders of this company, in meeting assembled and representing personally and by proxy a large majority of the issued stock of the company, do hereby recommend and instruct that the board of directors of this company cause the proper officers of the company to issue and to deliver to the said Chas. E. W. Smith 250 rights to the capital of the American Gold and Platinum Mines Company, the said 250 rights being equivalent to $1,250,000 of common stock and $50,000 of preferred stock, said 250 rights to be issued out of the stock set aside for treasury purposes, and it is further resolved, that the said approximate amount of $25,000 in cash heretofore mentioned as being an indebtedness held by the said Chas. E. W. Smith against this company, and any advances of cash which the said Chas. E. W. Smith may make hereafter for the benefit of this company in carrying out the plans for the development of the company's property should be repaid to him out of the first money received in the treasury of the

Digitized by Google

company by sales of treasury stock of the company. Upon motion duly made, seconded and carried, the foregoing resolution was adopted." The stock called for by the resolution was not issued to the defendant by the American Company, but after the plaintiff company was organized 130,000 shares of its stock were issued to him as the equivalent of the stock of the American Company, to which he claimed to be entitled by virtue of said resolution. The plaintiff, in its first cause of action, claims that this issue of stock to the defendant was invalid, and seeks to have it set aside, and demands that the defendant be decreed to retransfer and return the stock to its treasury. The plaintiff is entitled to this relief. The resolution of the American Company, by virtue of which this stock was issued to the defendant, cannot be sustained because it was passed for the personal benefit and advantage of the defendant by the controlling vote of the defendant himself while he was a director and officer of the company, and trustee and proxy for nearly all of the stockholders. The defendant states in his testimony that he did not vote on this resolution. The minutes show that he was present at the meeting and in control thereof, and there is no minute to the effect that he did not vote. If it is true that he did not vote, then, without his vote, there would not have been sufficient votes left to pass the resolution. This meeting of stockholders at which this resolution was adopted was a special meeting, and the notice thereof sent to the stockholders stated that it was "for the purpose of considering a plan of amalgamating the interests of properties of this company (the American Company) with that of the Consolidated Gold and Copper Mines Company, and for such other business in relation thereto, as well as the general business of the company, as may be presented to the meeting." I do not think that any reasonable construction of this notice would give any intimation to the stockholders that such a resolution as the one in question would come before the meeting. As the defendant controlled the corporation it would seem but fair that he should have given specific notice of such an important matter as was involved in this resolution before introducing it to the meeting. It certainly was not in relation to the "general

Digitized by Google

business" of the company that this resolution was introduced. Its general business was not to vote a large block of its stock to one of its own officers. That was particular and unusual business. This issue of stock to the defendant was not authorized by any of the terms of the merger agreement, nor was it ratified at any subsequent meeting by the stockholders of either of the constituent companies or of the plaintiff. It should, therefore, be set aside. Duncomb v. New York, H. & N. R. R. Co., 84 N. Y. 190; Central Trust Co. v. New York City & N. R. R. Co., 18 Abb. N. C. 381; United States Ice & Refrigerating Co. v. Reed, 2 How. Pr. (N. S.) 253; Welch v. Importers & T. N. Bank, 122 N. Y. 177.

In respect to the plaintiff's second cause of action the following appear to be the material facts: On June 16, 1902, a resolution adopted at a meeting of the directors of the American Company authorized the issuing of twenty notes of the company for $1,000 each, to run from four to six months each, each note to carry as a bonus 500 shares of the company's stock. The purpose of these notes was to raise money thereon to meet the "urgent need of funds to meet obligations incurred from day to day in the prosecution of its work at its mines in Arizona and to meet other necessary expenses." Twelve of these notes were negotiated, leaving eight of them still in the possession of the company. On January 3, 1903, the executive committee of the plaintiff company passed a resolution authorizing the substitution of its notes in renewal of, or in place of, these twenty notes of the American Company, which had then matured, and also attaching an additional bonus of 500 shares of its stock to each of the notes, so that the total bonus with each would be 1,000 shares of the plaintiff's stock. On September 13, 1902, a resolution was adopted by the board of directors of the plaintiff as follows: "Whereas there is a balance due Mr. Charles E. W. Smith for advances made on behalf of the American Gold and Platinum Mines Company and the Consolidated Gold and Copper Mines Company from time to time, and it is the desire of the A. G. & P. M. Co. and the Con. G. & C. M. Co. to liquidate such indebtedness: Resolved, That notes of $1,000 each, dated the twenty-sixth

Digitized by Google

day of June, and payable six months after date, shall be made payable to the order of Charles E. W. Smith to cover said indebtedness, each note to be accompanied by a certificate of 500 shares of the preferred stock of the United Gold and Platinum Mines Company. * * * said notes to be similar to the notes heretofore issued by the A. G. & P. M. Co." It does not appear that the notes of the plaintiff called for by this resolution of September thirteenth were issued to the defendant, but it does appear that he took over to himself at some time eight of the original notes of the American Company. The plaintiff now claims to be the owner of these eight notes, or of the renewals thereof by the plaintiff company, and of the shares of the stock of the plaintiff attached thereto as a bonus, as provided by the resolutions above set forth. I find nothing in the record to sustain the defendant's claim of ownership of these eight notes or renewals thereof, and of the shares of bonus stock. The only authority shown for the issuing of the notes and bonus stock is contained in the resolution of the American Company of June 16, 1902, and of the plaintiff's executive committee, January 3, 1903. The notes were issued for the purpose of raising money to meet the daily financial obligations of the American Company, not for paying an indebtedness owing to the defendant. The resolution of September 13, 1902, did not entitle the defendant to any of the notes created for a special purpose by the resolution of the directors of the American Company adopted June 16, 1902. The resolution of September thirteenth related to notes of the plaintiff company, and not to the original notes of the American Company, or to the renewals thereof. The evidence in this case convinces me that the defendant's conduct in respect to the affairs of the companies involved in this controversy has not been actuated by any wrongful motive. It is clear that he more than anyone else has given much of his time and labor to the building up of the plaintiff corporation and its constituent companies. Such has been his position as their most active and trusted manager and officer that it is perhaps only natural that he should have grown to believe that they should cheerfully allow him to have a controlling interest in all their affairs and

Digitized by Google

in their respective properties. While he may be right in this belief, the methods adopted to carry it into effect have not been such as the law will sanction. The defendant has lost sight of the fact that as an officer and director he is bound by the strict rules of conduct laid down by the law in its wisdom for the guidance of a trustee and for the sure protection of the *cestui que trust.* Judgment for the plaintiff.

Judgment for plaintiff.

CURTIS H. BOWNE, Plaintiff, *v.* CHARLES E. W. SMITH, Defendant.

(Supreme Court, New York Special Term, August, 1904.)

Corporation — Action by a stockholder to compel a director to account for his dealings in its stocks, etc. — A demand upon, and refusal of, the directors that they sue must be alleged — The fact that a director elects does not show that he controls the board.

A stockholder of a corporation cannot maintain an action on behalf of himself and of all other stockholders of the corporation to compel a director of the corporation to render an accounting with respect to all his dealings in relation to the stocks, funds, property and assets of the corporation, where he does not allege and prove a demand upon and a refusal by the directors of the corporation to bring the action, or that a majority of the directors of the corporation are themselves guilty of such fraud and misconduct as would make such a demand unavailing.

It does not follow that the defendant director controls the conduct of the board of directors, even though such board was elected through his controlling vote.

ACTION for an accounting.

Hardy & Shellabarger, for plaintiff.

H. D. Luce (John J. Adams, of counsel), for defendant.

BLANCHARD, J. The plaintiff is a stockholder in the United Gold and Platinum Mines Company, and brings this

Digitized by Google

action on behalf of himself and the other stockholders to secure from the defendant an accounting with respect to all his dealings in relation to the stock, funds, properties and assets of said corporation. In my opinion, in the case of United Gold and Platinum Mines Company v. Smith, *ante*, p. 567, I have discussed generally the facts and the law in relation to the defendant's conduct as an officer and director of the company, and as trustee for the stockholders, and the disposal of the issues in that case likewise disposes of the issues here, so far as the plaintiff is entitled to relief as a stockholder. There is no evidence in this case to sustain the plaintiff's alleged cause of action for an accounting. The defendant has not disposed of any of the stock which he holds as trustee for the stockholders, and there is, therefore, no need of any accounting with respect to it. Nor has the plaintiff alleged and proved a demand upon and refusal by the directors of the company to bring this action in his behalf, nor that the majority of the directors are themselves guilty of such fraud or misconduct as would make such a demand unavailing. Polhemus v. Polhemus, 43 Misc. Rep. 141; 88 N. Y. Supp. 273. The company has itself an interest in the stock, funds, properties and assets of the company, which is paramount to that of the plaintiff. It is a mere evasion to allege that the defendant is in control of the company. It does not follow that he controls the conduct of the board of directors even though it was elected through his controlling vote. Judgment for defendant dismissing the complaint, with costs.

Judgment for defendant dismissing complaint, with costs.

Digitized by Google

THE PEOPLE ex rel. JAMES J. O'TOOLE, Relator, v. THOMAS L. HAMILTON, County Clerk, Respondent.

(Supreme Court, New York Special Term, August, 1904.)

Comparison clerk in the New York county clerk's office — He is a public officer — Mandamus is not the proper remedy for reinstatement in the office when another person holds it — Change of civil service rule making a competitive place noncompetitive — It is a judicial act — Not set aside by mandamus.

A comparison clerk in the office of the county clerk of New York county is a public officer in the civil service of the state.

Such an officer cannot, after being removed, litigate, in mandamus proceedings, his claim to the office, while another person is holding the office under color of right and is in receipt of the salary attached thereto.

In changing the civil service rules by transferring a particular position from the competitive to the noncompetitive class, the state civil service commission acts in a judicial capacity and such action cannot be reversed or set aside in mandamus proceedings.

MOTION for a mandamus.

Edward A. Alexander, for relator.

John J. Delany, Corporation Counsel, for respondent.

BLANCHARD, J. On and prior to January 7, 1898, the relator was upon the eligible classified list of the State Civil Service Commission for the position of clerk in the office of the county clerk of New York county. On said 7th day of January, 1898, he was appointed from said eligible classified list as clerk in the said county clerk's office. He was assigned to perform the duties of indexing clerk and continued to perform such duties until May 1, 1900, when he was assigned to perform the duties of comparison clerk. The relator continued to perform the duties of comparison clerk until May 10, 1904. While he held the position of index clerk the State Civil Service Commission had, with the approval of the Governor, prescribed certain rules and regulations, which pro-

Digitized by Google

vided, among other things, that from June 16, 1900, the position of index clerk or comparison clerk in the office of the county clerk should be subject to competitive examination. On February 4, 1904, the State Civil Service Commission changed the said rules and regulations, with the approval of the Governor, and provided that the said position of index or comparison clerk in the office of the county clerk of New York county should not be subject to competitive examination, but should be a noncompetitive position in the classified service. On May 10, 1904, while the relator was holding the position of comparison clerk, he was removed therefrom by the county clerk. No reason was assigned for his removal nor was he afforded an opportunity to be heard in his own behalf in respect thereto. The position made vacant by the relator's removal was filled by an appointee of the county clerk, who has continued to hold the position and to receive the salary attached thereto. Under the authority of Martin v. City of New York, 82 App. Div. 35; affd., 176 N. Y. 371, it is clear that the relator was a public officer in the civil service of the State. The relator, like the plaintiff in the case above cited, was not performing his services under a contract of employment, but was receiving a regular salary for performing the duties of an office to which he had been appointed in the manner provided by law. Being such officer he cannot in mandamus proceedings litigate his claim to the office from which he has been removed while another holds it under color of right and is in receipt of the salary attached thereto. This proposition is now too firmly established in our system of legal procedure to be open to question. In People ex rel. McLaughlin v. Police Commissioners, 174 N. Y. 450, Chief Judge Parker, after reviewing all the authorities, states: "The learned counsel for relator has not brought to our attention any decision in this state holding that a mandamus will lie where some one is actually in possession of the office under color of right. * * * It is also a general rule that mandamus will not be granted where a party has another specific legal remedy, and from the earliest times the legal remedy for trying the title to an office was by the writ of *quo warranto*, now a direct action brought by the attorney-

Digitized by Google

general." The present incumbent of the office from which the relator was removed is certainly holding it under color of right. In changing the civil service rules, by virtue of which change it became possible to remove the relator from his position and give it to the present incumbent, the State Civil Service Commission acted in a quasi judicial capacity, and their action cannot be reviewed or set aside in mandamus proceedings. People ex rel. Sims v. Collier, 175 N. Y. 196.

Motion denied, no costs.

JAMES R. PALMER and GERTRUDE KNAPP, Plaintiffs, *v.* CHARLES J. DAY, WILLIAM A. ABBOTT et al., Defendants.

(Supreme Court, New York Special Term, August, 1904.)

Pleading — Striking out irrelevant matter sparingly exercised in an equity case.

No part of a pleading will be stricken out as irrelevant unless the court can see that the moving party is aggrieved by it and that striking it out will not harm the pleader.

Semble, that in equity actions greater latitude and liberality are allowed in the preparation of pleadings than in other actions, and that the power to strike out from such pleadings matter which is claimed to be irrelevant should be used with reluctance and caution.

ACTION to set aside and declare invalid certain portions of a last will and testament. Motion under section 545 of the Code of Civil Procedure to strike out several paragraphs of the complaint.

Jay N. Candler, for plaintiffs.

Putney, Twombly & Putney, for defendants.

BLANCHARD, J. This is an action to set aside and declare invalid certain portions of a last will and testament and this motion is made under section 545 of the Code of Civil Pro-

Digitized by Google

cedure to strike out several paragraphs of the complaint on the ground that they are irrelevant. There is little benefit in motions of this kind and there may be much harm. Town of Essex v. New York & C. R. R. Co., 8 Hun, 361. No part of a pleading will be stricken out as irrelevant unless the court can see that the moving party is aggrieved by it and that striking it out will not harm the pleader. Stieffel v. Tolhurst, 32 Misc. Rep. 469; affd., 55 App. Div. 532. In Park v. Nat. Druggist Assn., 30 App. Div. 508, the court said: "The nature of the relief itself frequently requires, not only that the ultimate facts from which the right to relief arises should be stated, but that facts which are somewhat collateral should be laid before the court so that the precise relief required to give the party what he is entitled to and the way in which that relief shall be granted may be understood. For that reason in actions of that nature greater latitude and liberality are allowed in the preparation of pleading than in other actions, and the power to strike out matter which is claimed to be irrelevant should be used with reluctance and caution." As this is an action in equity I think the language quoted applies and that the motion to strike out should be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

THE WRIGHT STEAM ENGINE WORKS, Plaintiff, *v.* THE NEW YORK KEROSENE OIL ENGINE CO., Defendant.

(Supreme Court, New York Special Term, August, 1904.)

Replevin — Interpleader of a third person claiming the property.

Where, in an action of replevin, the sheriff, after taking possession of the property, delivers it to the plaintiff, upon the latter giving the usual undertaking, if a third party interposes a claim to the possession of the property under section 1709 of the Code of Civil Procedure and the defendant makes no claim whatever to the property, the court will make an order interpleading the third party in the place of the defendant, but will make no direction as to the disposition of the property pending the action.

Digitized by Google

ACTION of replevin. Motion for interpleader.

Charles De Hart Brower, for plaintiff.

William A. Shortt, for defendant.

BLANCHARD, J. This is an action of replevin. The sheriff took possession of the property and the plaintiff having given the usual undertaking, the sheriff has delivered the property to the plaintiff, who now has it. A third party made a claim to the property, under section 1709 of the Code of Civil Procedure, while the same was in the possession of the sheriff. The plaintiff gave to the sheriff the usual undertaking and retains possession of the property. I do not think that Pelham Hod Elevating Co. v. Baggaley, 12 N. Y. Supp. 218, is an authority for the denial of this motion. In that case no claim was made under section 1709 of the Code of Civil Procedure by a third party, and the order of substitution directed that the property be turned over to a receiver. This direction was clearly improper, as the plaintiff, having given the proper undertaking, was entitled to the possession of the property. In the case at bar a third party has made a claim of right to the possession of the property in question under section 1709 of the Code of Civil Procedure, and the plaintiff, having given to the sheriff proper security, is entitled to retain the possession. The issue of the right of possession arises solely between the plaintiff and this third party claimant. The defendant makes no claim whatever to the property, and, as the law has already taken the possession of the same away from it and given it to the party who, under the rules and practice of the court, is entitled to it until the final determination in the action, I can see no valid reason why the present defendant should be compelled to defend the action. So far as it is concerned there is no issue as to the possession whatever, as the property was originally placed in its charge merely for storage by the third party claimant. If this claimant is substituted in the place of the present defendant the issue as to the right of possession may be

Digitized by Google

properly disposed of. The motion for interpleader will be granted, but as the property is now properly in the possession of the plaintiff, pending the action, no direction as to its disposition will be made. No costs.

Ordered accordingly.

THEODORE PRICE, Plaintiff, *v.* JAMES H. PARKER, RICHARD A. SPRINGS and WILLIAM D. MARTIN, Defendants.

(Supreme Court, New York Special Term, August, 1904.)

Complaint — Allegations as to tortious conduct do not make the action one in tort — Waiver of the tort — An election to proceed on contract is final — What is an election — Reference on the ground that a long account must be examined — What issues outside of the account will not prevent the reference.

Where the gravamen of a complaint is on contract, the fact that there are allegations therein charging tortious conduct on the part of the defendant is not enough to make the action one sounding in tort.

Where the facts alleged in a complaint will support an action in tort, the plaintiff may waive the cause of action in tort and rely upon assumpsit, where the facts authorize such an action.

Such an election, when once made, precludes the plaintiff from thereafter proceeding as in an action for tort.

A statement made by the plaintiff in an affidavit submitted by him in opposition to a motion for a change of venue, that the action is in tort, does not constitute a binding election, where it appears that the statement in question was merely incidental and that it apparently had no effect upon the decision of the court which was adverse to the plaintiff.

If, however, the plaintiff succeeds in obtaining a reference of the issues arising in the action, on the faith of his formal declaration that the action is upon contract and not in tort, he will be held to have made an election which will be binding upon him in all future proceedings in the action.

When a reference of the issues arising in an action at law brought against a firm of cotton brokers by a customer thereof will be ordered on the ground that the trial of such issues will require the examination of a long account and will not require the decision of difficult questions of law, considered.

In such a case, the mere fact that the plaintiff's cause of action is disputed, or that issues outside the account are raised,

Digitized by Google

is not alone sufficient to defeat the right to a reference; nor will such right be defeated by the fact that the examination of the long account is made necessary only by the defence interposed, where it appears that the effect of the defence is to make the long account an element in the proof of the plaintiff's cause of action, and consequently, that it cannot properly be considered as a separate or independent issue.

The rule is otherwise where a counterclaim is interposed which sets up a distinct and independent cause of action.

MOTION for a reference of the issues under section 1013 of the Code of Civil Procedure on the ground that the trial of the issues will require the examination of a long account.

Hornblower, Byrne, Miller & Potter (William B. Hornblower, of counsel), for motion.

John R. Abney (William D. Guthrie, John R. Abney, Paul E. De Fere, of counsel), for defendants, opposed.

GIEGERICH, J. The plaintiff moves for an order of reference upon the ground that the trial of the action will require the examination of a long account and will not require the decision of difficult questions of law. The defendants resist the motion on various grounds, which will be discussed successively. The first is that the plaintiff, having elected to proceed in tort, cannot now make another election to proceed upon contract for the purpose of obtaining a reference. This objection is urged upon two grounds: The first is that the complaint itself is founded in tort; but I think an examination of that pleading shows that the defendants are mistaken. While it is true that incidentally certain allegations are made in the complaint as to conversion by the defendants and as to fraudulent conduct, the gravamen of the complaint and the substance of the cause of action are for breach of the contract of employment of the defendants by the plaintiff as commission merchants and brokers for him, and the allegations as to conversion, etc., are merely incidental. Where the gravamen of the complaint is on contract, the fact that there are allegations therein charging tortious conduct on the

Digitized by Google

part of the defendants is not enough to make the action one sounding in tort. In People v. Wood, 121 N. Y. 522, it is said (p. 529): "Even if, upon the facts alleged, a cause of action in tort might be spelled out from the language of the complaint, it is established by ample authority that it is still optional with the injured party to waive the tort and rely upon assumpsit, if he chooses to do so, where the facts authorize such an action. (Goodwin v. Griffis, 88 N. Y. 629; Rothschild v. Mack, 115 id. 1.) The right of the plaintiffs to waive their cause of action in tort and found their right to recover upon contract, whether express or implied, is unquestionable, and there is no power either with the defendant or in the court to compel them to proceed upon the tort." In this case the General Term reversed the order of reference and the Court of Appeals reversed the General Term, saying, among other things (at p. 529): "The motion to refer constitutes, we think, such an election and precludes the People from afterwards proceeding as in an action for tort." In Conaughty v. Nichols, 42 N. Y. 83, it was held that a complaint containing a statement of facts constituting a cause of action on contract might be sustained by proof of such facts upon the trial, although the complaint was in form for a conversion, and the court refused to set aside a judgment founded upon the contract proved, saying that the complaint contained "an ample statement of facts constituting a cause of action on contract, and such allegations were clearly supported by the evidence;" and held (p. 87) that the plaintiff should not be deprived of his judgment "because the complaint contained an allegation which was unnecessary to such cause of action, and which might well have been disregarded." See also Neftel v. Lightstone, 77 N. Y. 96; Byxbie v. Wood, 24 id. 607. In this case the plaintiff expressly waives any claim that the cause of action set up in the complaint is of a tort nature, and in his affidavit says: "I claim damages in this action only for the breach of the contract therein alleged between the defendants and myself." The second reason assigned why it should be held that an election has been made is that the plaintiff has heretofore claimed that the action was founded in tort, in an affidavit resisting a former motion

Digitized by Google

made by the defendants to change the venue from Kings county to New York county. There was no occasion at that time for taking any affirmative or decisive action one way or the other, as the motion was merely one to change the place of trial, and on this question the statement that the action was for conversion was merely incidental and apparently had no effect upon the decision. If the plaintiff had won there might perhaps be some ground for urging that he had made a binding election. He lost, however, and the defendants' claim that the action be tried in this county was sustained. If, on the other hand, he succeeds in this motion and obtains a reference on a formal declaration that his action is on contract only, and not in tort, he will, as shown above, be held to his election in all future proceedings in the action. He has come to the parting of the ways and has taken affirmative and decisive action that is irrevocable.

So far as the contentions made on the motion to change the place of trial are concerned, it is to be observed that there is more or less shifting of positions on the part of the defendants as well as the plaintiff, but I do not think the decision of so important a motion in the action as this should be greatly influenced by the claims and contentions on either side upon that motion.

Coming now to the argument advanced on behalf of the defendants that the trial of this action cannot, in any event, involve the examination of a long account, I am satisfied of the contrary. The complaint alleges the purchase on the defendants' part as brokers for the account of the plaintiff of contracts for the purchase of 638,900 bales of cotton for delivery to them for the plaintiff's account in the month of January, 1903, and that each of such contracts was for the purchase of 100 bales. It is further alleged that the plaintiff was to deposit a margin of one dollar per bale against such transactions, and to renew the same when absorbed to the extent of fifty per cent., there being a further provision that where contracts to sell were made against contracts to purchase, that then, in the event of fluctuations, the losses on the one class of transactions should be offset by the gains on the other class, and that only the difference should be considered

Digitized by Google

in determining the amount of the margin required, there being a distinction also between such offsetting transactions where both classes of transactions were in the New York market, and where some were in this market and some in other markets, as Liverpool or New Orleans. The complaint also alleges that the defendants had in their hands at all times the full amount of margin required on all purchases and sales made by the defendants under their employment, which allegation the answer denies. The complaint also avers that the defendants, without authority, disposed of contracts of purchase for the delivery to the defendants during the month of January, 1903, to the amount of 427,700 bales, as specified in a schedule annexed to the complaint. The answer, in addition to various denials, sets up as an affirmative defense a defect of parties plaintiff in that other individuals or firms were associated with the plaintiff and are interested in the alleged cause of action; and for a second separate defense alleges that the purchase of contracts for the future delivery of cotton in January, 1903, as alleged in the complaint, was only a part of the transactions, of which the other part consisted of the sale for plaintiff's account of a large number of contracts for future delivery of cotton during other months. In this defense it is further alleged that on November 8, 1902, the plaintiff notified the defendants that he was at the end of his resources and could furnish no more margins, and that he had large outstanding obligations with other brokers through whom he had purchased and sold large quantities of cotton for future delivery, and that they were about to call upon him for additional margins, to which calls he would be unable to respond, and that it was agreed between the plaintiff and the defendants that the latter should "take over all such accounts with other brokers and that the accounts so taken over, together with the contracts already in the hands of the defendants, consisting of 'straight,' 'straddle' and 'spot' cotton transactions be liquidated and handled by, and in the sole discretion of, the defendant James H. Parker, who should have exclusive management and direction and absolute control of said contracts and full power to carry on the liquidation thereof and of the collateral held

Digitized by Google

by defendants in such manner and at such times as he saw fit, without consultation with or notice to the plaintiff, and without any interference on his part, and including the power to make repurchases and resales of contracts for cotton, as to said Parker might seem advisable;" and that the defendant Parker, in pursuance of such agreement, proceeded to liquidate the accounts, and that about December 11, 1902, there remained in the hands of the defendants contracts for the purchase of 42,300 bales of cotton for January, 1903, delivery; contracts for the purchase of 5,500 bales of cotton for March, 1903, delivery, and contracts for the sale of 48,100 bales of cotton for May, 1903, delivery, together with some shares of stock and cash in the amount of upwards of $90,000; and, further, that the plaintiff was notified of said transactions and approved and ratified the same, and accepted from the defendants the said remaining contracts for the purchase and sale of the said securities and money, except a small balance which the defendants duly tendered prior to the commencement of the action. In the plaintiff's affidavit, on which this motion is made, he states, among other things, that the contracts of purchase for the future delivery of January, 1903, cotton mentioned in the complaint were only a part of the transactions between him and the defendants, and that the other parts consisted or should have consisted of contracts of sale for future delivery during months other than January, which contracts he had ordered them to make, and which they reported to him that they had made and were carrying for his account. In this affidavit the plaintiff further states that he disputes and repudiates each and every one of the credit items in the account mentioned in the complaint representing 4,277 contracts of purchase and the same number of contracts of sale, and also that he not only denies the defendants' authority to make for him the said sales of cotton for delivery in January, but also disputes that they actually made any of such alleged contracts which the credit items purport to represent, or that the defendants actually made application of any of the said contracts of sale to any of the said contracts of purchase, and that such contracts of sale, if made at all, were not applied to the plaintiff's con-

Digitized by Google

tracts of purchase, and that he will on the trial require the defendants to disclose every detail of how they used his contracts, which would involve the examination of accounts between the defendants and other members of the New York Cotton Exchange in which they set off and settled their mutual contracts between themselves by means of what are known on that exchange as "ring settlements," "direct settlements" and "clearing house settlements," which are extremely intricate and complicated matters of account. It appears, furthermore, that under the allegation in the complaint that the margins were kept good as required, which allegation is denied in the answer, it will be necessary to go into the various accounts set forth in the exhibits annexed to the complaint. Upon such pleadings and such allegations in the moving affidavit it seems obvious that long accounts will have to be gone into at the trial. The cases relied upon to support the proposition that when the plaintiff's cause of action is disputed a reference will not be ordered are broadly distinguishable from this. That distinction was pointed out recently by the Appellate Division of this department in the case of Boisnot v. Wilson, N. Y. L. J., July 15, 1904, where the Special Term had refused a reference on the ground that as the contract relied upon was disputed an accounting would be necessary only in the event of the plaintiff succeeding in the main issue. In reversing the order the Appellate Division said: "This action is one at law. It must be tried by a jury, and upon the trial the plaintiff will not only have to prove his contract, but will have to prove the amount due him under it. Then if the defense of the Statute of Limitations is successful as to a portion of the plaintiff's claim the question of the amount due the plaintiff would depend upon the profits during the years not barred by the Statute of Limitations. Thus, from the very nature of the contract alleged the amount due to the plaintiff is to be determined upon an ascertainment of the profits of the store of which the plaintiff was the manager, and it is entirely clear that this question cannot be intelligently tried by a jury. The rule announced by the court below would be correct if the action was for an accounting where the right to an accounting

Digitized by Google

should be determined by the court upon the trial, and in the event that an accounting was necessary the account could be directed by an interlocutory judgment; but as this action is one at law, and must be tried by a jury, it is not practicable to first determine the question as to the contract and then direct an interlocutory judgment for an accounting." As will be seen from the foregoing quotation, the mere fact that issues outside the account are raised is not alone enough to defeat the right to a reference. The same rule was applied by the General Term of this department in Hall v. United States Reflector Co., 14 Wkly. Dig. 48; affd., 95 N. Y. 648; 96 id. 629, and referred to with approval in Steck v. Colorado Fuel & Iron Co., 142 id. 236, 249, where it was held that when the investigation of a long account is required an order of reference may be granted, although the question as to whether or not a copartnership existed, depending upon the construction of an agreement, and a question of fraud are involved in the case. An observation made in that case seems equally applicable in this, viz.: "The defense set up and the issues resulting from them and the reply (in this case affidavit) would seem to be such as to require the more deliberate investigation which is secured by a reference than could be had upon a trial at Circuit," and such weight was given to the consideration mentioned that the reference was ordered, notwithstanding the issue of fraud even. The case of Steck v. Colorado Fuel & Iron Co., *supra*, relied upon by the defendants, has been distinguished in Irving v. Irving, 90 Hun, 422; affd., without opinion, 149 N. Y. 573, the court pointing out that when the long account is brought into the case by a counterclaim setting up a distinct and independent cause of action, and which is not an element in the proof of the plaintiff's cause of action, a reference cannot be ordered, but where a defense necessarily involving a long account is interposed, then a reference may be ordered, although the cause of action set up in a complaint appears on its face to be nonreferable. In the Irving case, as in this, there is present the peculiar feature that the long account, although set up in a defense, is, nevertheless, so brought in as to make it an element in the proof of the plaintiff's cause of action, and, con-

Digitized by Google

sequently, cannot properly be considered as a separate or independent issue. Just as in that case the plaintiff had to prove consideration for the note sued upon, which necessitated the examination of numerous stock transactions out of which it was alleged in the answer a false account had been created, and in consideration of which the note in suit had been given, so here the plaintiff will have to go into long accounts to support his averment that margins were kept good.

The principle of the decision in the Irving case was sustained in Ames v. French, 83 App. Div. 452. That action was brought by stockbrokers against a customer upon an account stated, the account attached to the complaint showing a dealing in various stocks aggregating an amount of over $236,000. The answer alleged that such account was fictitious, false and fraudulent, and for a counterclaim alleged that the defendant employed the plaintiffs to purchase and sell stocks for him; that they did not execute a large number of his orders, and rendered to him false and pretended statements of transactions of purchases and sales ordered to be made, but which had never, in fact, been made, and prayed for judgment that the plaintiffs be required to account to the defendant for all matters relating to the transactions thus set forth. The reply subsequently denied the allegations of the answer constituting the counterclaim. It was held that the taking of the account between the parties upon which the defense was based involved the examination of a long account that would be impracticable before a jury, and that the court below properly ordered the issues referred. In affirming the order Mr. Justice Ingraham, speaking for a majority of the court (at p. 454), said: "The action being thus upon an account stated, the plaintiffs' cause of action would be made out by proving the statement of the account. The defendant, however, attacks the account as having been false and fraudulent, alleging that the amount claimed is not, in fact, actually due and that the reports and statements upon which the accounts between the parties were accepted by the defendant contained false and fraudulent representations. This is a direct attack upon the correctness of the account rendered by

Digitized by Google

the plaintiffs and upon which the action is brought; and it is quite evident that to determine the issues presented by the pleadings, in order to show that the statement of the account relied upon by the plaintiffs was one based upon a false and fraudulent statement of accounts, the accounting asked for by the defendant will be necessary. Such an accounting for which the defendant asks, and which will be necessary to determine the issues raised by the pleadings, is thus the real issue that is presented, and it would seem to be quite evident that such an accounting will be impossible before a jury. The case is, therefore, brought within the provisions of section 1013 of the Code of Civil Procedure." It is also argued in opposition to the motion that difficult questions of law will have to be decided, but it is not apparent that such will be the case. So far as this motion discloses a competent referee can readily pass upon all questions that will be presented. Motion granted, with ten dollars costs to abide the event.

Motion granted, with ten dollars costs to abide event.

FREDERIC DIEDERICHS, Plaintiff, *v.* HANNAH M. DIEDERICHS, Defendant.

(Supreme Court, New York Special Term, August, 1904.)

Action for divorce — What must be shown in support of a confession made by the guilty party — Proof required of defendant's default outside of an entry thereof in the register of the plaintiff's attorney.

To justify the court in awarding a judgment of absolute divorce upon the confession of the party charged with adultery, the circumstances attending such confession must be shown to be of a character that precludes all suspicion of collusion and as a general rule such confession should be corroborated by other proof.

In such a case, a witness sworn to establish that the defendant made default in pleading should be shown to have more definite knowledge of the default than that derived from a mere inspection of the register of the plaintiff's former attorney of record.

ACTION for an absolute divorce.

Charles S. Sinsheimer, for plaintiff.

No appearance for defendant.

Digitized by Google

GILDERSLEEVE, J. This is an undefended action for an absolute divorce brought by the husband. The testimony is meagre and incomplete. The plaintiff himself was not called as a witness, and there is none of the formal proof usually required of a plaintiff in these actions, beyond the allegations of the verified complaint. One Alfredo U. Giallorenzi swears that he is "the attorney in fact" for the plaintiff, and holds a power of attorney from him, and the plaintiff's present attorney of record in this action, Mr. C. S. Sinsheimer, offers in evidence a cablegram from plaintiff to said Giallorenzi dated July eighth, and worded as follows: "Proceed at once. Defendant 674 East 152, preparing departure. Money sent." Which cablegram is offered in support of said Giallorenzi's claim of authority to act for plaintiff, and as evidence of the latter's desire to prosecute this action. Mr. Sinsheimer also offers in evidence a typewritten copy of a "statement and confession" made by Hannah Miller Diederichs on December 17, 1902, before Albert W. Swalm, American consul at Monte Video, South America. In this "statement" the said Hannah Miller Diederichs confesses various acts of adultery with one Edvardo Casaravilla during October and November, 1902, at Monte Video. The said "statement" is not verified, but attached thereto is a certificate of the said consul, certifying the genuineness of the signature "Hannah Miller Diederichs" written on the margin of the said certificate, and also stating that the attached document is a true copy of a "statement or confession" of said Hannah Miller Diederichs "as taken by the undersigned (consul) on December 17, 1902." The only witness called at the trial is the said Giallorenzi, who states that he first met Mrs. Diederichs on August 20, 1903, when she called at his office at No. 61 Park Row, in this city, in response to a letter which he had sent to her at No. 674 East One Hundred and Fifty-second street. The witness had previously received the cablegram from plaintiff, above mentioned, and had visited No. 674 East One Hundred and Fifty-second street, but had been unable to find Mrs. Diederichs there. He thereupon wrote to her at that address, asking an interview, and she, a short time thereafter, called upon him, as above stated. He says he had never seen

Digitized by Google

her before, and that he then had an hour and a half conversation with her, in which she admitted her signature on the consul's certificate, also identified the marriage certificate and a photograph, which she said was that of Casaravilla, the corespondent in this action. The witness is then asked: "Q. What did she say to you with respect to the 'affidavit' that she made? A. She told me that it was all true, and that she had made that 'affidavit' of her own free will before Colonel Swalm." The witness here refers, presumably, to the "statement" of Hannah Miller Diederichs made before the American consul on December 17, 1902, at Monte Video. The witness, at this interview, served a copy of the summons and complaint on his said visitor, who then stated that "she did not care to fight the case, but would take the papers and go." The lady so served with process does not appear to have been in any way identified as the wife of plaintiff, except by her own admissions to the witness Giallorenzi, to whom she was a perfect stranger. Giallorenzi goes on to state that she made him a subsequent visit and asked him to write to the plaintiff and try to effect a reconciliation; that he did so write, and that plaintiff replied that he would have nothing to do with his wife, and wanted to proceed with the action. Upon receipt of this letter Giallorenzi sent for her and showed her plaintiff's answer. Again the witness saw her, he says, shortly before the trial, at No. 327 West Twentieth street, where she lived under the name of Mrs. Grover, when he told her the case was about to be reached for trial, to which she replied that she did "not care to appear or do anything." Nowhere, as I have said, is there any evidence that this woman, known as Mrs. Grover, is the defendant, other than her statements to Giallorenzi, as above set forth.

The only testimony as to the defendant's default is that of Giallorenzi to the effect that he "kept the register in Mr. Hyman's (plaintiff's original attorney of record) office," and that so far, apparently, as this register showed, "there was no appearance made or answer served, and defendant is in default." Even should we assume that the identification of the defendant as the person served with process is suffi-

Digitized by Google

ciently established, we would still be confronted by the fact that the only evidence of adultery is the confession of the defendant herself. To warrant the court in basing a judgment of absolute divorce upon the confession of the party charged with adultery, the circumstances of such confession must be shown to be of a character that precludes all suspicion of collusion, and, as a general rule, such confession should be corroborated by other proof. The evidence in the case at bar does not meet these requirements. The case may be restored to the calendar, and the plaintiff given an opportunity to supply the deficiencies of the evidence in respect to the charge of adultery, and also strengthen the proof as to the identity of the defendant as the person served with process. Likewise the witness Giallorenzi should be shown to have more definite knowledge of defendant's default than that derived from a mere inspection of the "register" of plaintiff's former attorney of record in this action. As it now stands, the evidence is entirely insufficient to entitle the plaintiff to a judgment.

Ordered accordingly.

ISAAC P. SMITH, as Executor of the Last Will and Testament of CHARLES G. HAVENS, Deceased, and Trustee under Said Will, Plaintiff, *v.* THE HAVENS RELIEF FUND SOCIETY et al., Defendants.

(Supreme Court, New York Special Term, August, 1904.)

What are benevolent and charitable purposes — What detail of definition is required of the beneficiaries of a corporation — Delegation of discretionary powers — Incorporation validated by legislative enactment — Formalities of incorporation may be dispensed with — The constitutional provision as to incorporation under general laws is permissive — What devise to a charitable corporation does not create a trust — What establishes a secret trust — What provisions for annuitants do not involve an unlawful suspension of the power of alienation — Charge upon real property — Estates, suspended on two selected lives, for the benefit of any number of persons — Trusts and annuities distinguished.

The certificate of incorporation of The Havens Relief Fund Society provided, "That the particular business and objects of such

Digitized by Google

society shall be the receipt of such money and property as shall be voluntarily contributed, paid, conveyed, devised, bequeathed or in any way transferred to the society and the investment of the same to produce an income, and the application of the income from time to time through corporate or private agencies to the relief of poverty and distress, and especially the affording of temporary relief to unobtrusive suffering endured by industrious or worthy persons, but including the bestowal and distribution of any part of such income to and among benevolent and charitable institutions, objects or persons, such as shall be deemed most useful and deserving or judicious, considering the different modes of application and expenditure or use of funds, and the practical results, and including the right to employ and superintend almoners, without being required or undertaking to act immediately or directly as almoners, and generally in respect to any property received by deed or will for any benevolent or charitable use or purpose, including the right to comply with the directions of the donor in regard thereto."

Held that the particular business and objects of this society were benevolent and charitable within the meaning of those terms as used in section 1 of chapter 319 of the Laws of 1848, and that the society was lawfully incorporated under that act;

That the scheme contemplated by it did not involve the delegation by it of the discretionary power of selection of its beneficiaries;

That even if the certificate alone was insufficient to effect the creation of a valid corporation, the legislature, by chapter 301 of the Laws of 1871, which was passed four months after the filing of the certificate of incorporation, for the primary purpose of removing the limit to the amount of property which the society might take and hold, and which contained a verbatim recital of the purposes and objects of the society as they were stated in the certificate of incorporation, validated the incorporation of the society, or else created a valid corporation in the first instance;

That a charity is an undertaking which contemplates the public benefit or the well-being of a community or class as contrasted with a benevolent use for a private purpose or for a private individual;

That in the incorporation of a charitable society, the law does not require the ultimate recipients of the bounties of the society to be minutely and precisely identified;

That the legislature, being the power authorized to prescribe the formalities requisite to the formation of a corporation, has the right to dispense with such formalities or to legalize the existence of a corporation whose organization was defective because of a failure to comply with such requirements;

Digitized by Google

That, in the absence of a constitutional requirement, no certain terms or express words are necessary to effect the granting of a corporate franchise;

That any expression whatsoever showing the legislative intention to confer the right to exercise corporate franchises is sufficient and that this intention may be deduced from the whole of the legislative act; that the use of the word "incorporate" or of a similar expression is unnecessary;

That section 1 of article VIII of the State Constitution, which provides, "Corporations may be formed under general laws; but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws," is not mandatory in its requirement that corporations be formed under general laws, but permissive;

That, whether a special act of incorporation is necessary is a matter entirely within the judgment and discretion of the legislature and that the courts have no power to review its action in this regard;

That a devise and bequest of a residuary estate to a charitable corporation, "to be held and applied by the said Society for the purposes of the incorporation thereof, it being my wish however that the principal be kept invested and only the income distributed or expended for the charitable purposes of the society," does not create a trust, but simply a gift outright to charitable uses and consequently does not offend public policy or the statute against perpetuities;

That to fasten a secret trust upon a trust created by will, such trust must spring from the intention of the testator and from the promise, express or implied by silent acquiescence or tacit consent, of the legatee;

That the only intention of the testator which can be considered is that of his last will, and the only promise a promise made with reference to such will.

By the fifth, thirteenth, fourteenth and nineteenth clauses of a will, the testator provided for the payment of annuities to six persons. The provisions of these six annuities were substantially similar. None of them was in terms charged on any lands or specific fund, but the executors were simply directed to pay them in certain installments.

By the sixth clause of the will, the testator devised certain land on Thirtieth street in the city of New York to his executors upon trust "to apply such net income to the extent or limit of twelve hundred dollars per year to the use of my namesake, Charles G. H. Stephens, son of Amelia W. and Edgar W. Stephens, from and after my decease until he attains the age of twenty-five years and thereafter to the limit or extent of one thousand dollars per

Digitized by Google

year to the use of the said Charles G. H. Stephens during his remaining natural life. And I also direct my executors to apply the said net income to the limit or extent of six hundred dollars per year to the use of Charlotte A. W. Tilden, the adopted daughter of my deceased namesake, Charlietta G. H. Tilden, during her remaining natural life in the manner however and subject to the conditions provided in the sixteenth article of this my will. And subject to the preceding provisions of this article and to the extent that it is within my power so to do I charge upon the said lands and premises and upon the net income thereof each and every the annuities payable under this my will. * * * And subject to the provisions of this item of my will and except in so far as the said lands and premises or the income thereof shall be actually applied or used to and for the satisfaction of such provisions I direct that the same disposition be made of the said lands and premises and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate."

By the seventh clause of his will, the testator devised certain leasehold lands on Nineteenth street in the city of New York upon a trust to apply the net income to the extent of $1,000 a year to the use of Amelia W. Stephens for life. The executors were empowered to purchase the fee of the leasehold lands, in which event the lands were made subject to the provisions of the trust.

The seventh clause further provided, "subject to the provisions of this item of my will and except in so far as the said leasehold lands and premises or the fee if acquired thereof shall be actually applied or used to and for the satisfaction of such provisions I direct that the same disposition and application be made of the said leasehold lots of land and premises or the fee if acquired thereof and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate. And in case and to the extent that the income so applicable to the use of the said Amelia W. Stephens shall not be equal to the annual sum of one thousand dollars throughout the period of her natural life from and after my decease then and in such case and out of my general estate my executors are directed to make good and pay in quarterly or other convenient instalments the deficiency or amount necessary to ensure to her such annual sum."

The seventeenth clause of the will made general provision for all the annuities in the following language: "My executors are authorized to set apart and safely invest and keep invested such sums as in their reasonable discretion they shall deem proper to secure payment of the hereinbefore mentioned annuities and annual sums and meet any of the provisions of this my will except and to the extent that the same are hereinbefore adequately provided for. And whenever and as each or any fund set apart or

Digitized by Google

provided for these purposes ceases to be needed therefor I direct that the same disposition or application be made of the same or if any remainder thereof as is hereinafter provided for or in respect of my residuary estate."

Held that the trusts created for the benefit of the several annuitants did not involve an unlawful suspension of the power of alienation;

That the Thirtieth street property was tied up for two lives only, to wit, those of Charles G. H. Stephens and Charlotte A. W. Tilden;

That the Nineteenth street property was tied up for one life only, to wit, that of Amelia W. Stephens;

That the remaining six annuities stood as independent gifts, supported, if need be, by independent trusts;

That such six annuities would be payable out of the general estate or by the setting apart of specific sums;

That a testator may in the creation of a trust suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being, and with this limitation during that period he may provide for the distribution of the annual income among as many different persons and for as many successive lives as he sees fit;

That the importance of the distinction between a trust to pay annuities and the trust to pay income lies in the fact that the latter trust invariably occasions a suspension of the power of alienation, while annuities, in so far as they may be classified as legacies or as successive payments of sums in gross, are releasable and assignable and do not occasion suspension.

ACTION for the construction of a will.

Stikeman & Silber, for plaintiff.

F. W. Stevens, for defendants Amelia W. Stephens and C. G. Stephens.

Signor & Wage (James Taylor Lewis, of counsel), for defendant Elizabeth Royce Sawyer, individually, and as executrix of Charles Sawyer.

Herbert Reed (James Taylor Lewis, of counsel), for defendant Ellen King.

Newell, Chapman & Newell, for defendant Charlotte A. W. Costello.

Digitized by Google

Kellogg & Van Hoesen, for defendants H. Clark, Elizabeth B. Clark and Mary A. Littlejohn, personally and as executrix; also for defendants Glover, Stanley, Valentine, Parmley, Brigham and Reed.

William J. Mantanye, for defendants DuRay Hunt, J. Warren Hunt, Esther A. Hunt, Corrie H. Chapman, Myra W. Hunt, Lotta Hunt Murray, personally and as executrix, etc., of De Forrest Hunt, deceased; Esther A. Hunt and Alburtis A. Carley, as executors, etc., of Daniel Delos Hunt, deceased, and Harriet Perkins.

Clark & Vedder (Thomas D. Rambaut, of counsel), for defendant Beekman Hunt.

Francis S. Hutchins (C. La Rue Munson, of counsel), for defendants George W. Havens, Charles M. Havens, De Ray Smith, E. A. Smith, Patrick J. Delehanty and Adaphene Armstrong.

Leonard S. Wheeler (George B. Abbott, of counsel), for Havens Relief Fund Society.

George B. Abbott, for defendant W. H. H. Moore.

LEVENTRITT, J. The plaintiff prays the judgment of the court construing the will of his testator. The defendants comprise, on the one hand, the direct beneficiaries, and on the other, the heirs and next of kin or their representatives, who would take as in the case of intestacy in the event of the invalidity of the trusts or gifts created by the instrument.

The general scheme of the will, which is long and elaborate, may be briefly stated. After making a number of bequests that are unattacked, nine annuities are provided for, while the bulk of the estate passes under the residuary clause to the Havens Relief Fund Society with a substitutional unconditional gift to certain designated persons in the event of the society's disability to take.

The annuities are attacked on the ground that the trusts

Digitized by Google

created to provide them unduly suspend the power of alienation; the gift to the Havens Relief Fund Society is asserted to be void because that society never having attained a valid corporate existence, had no capacity to take; and the substitutional gift over is declared to fail because by evidence *dehors* the will a secret trust is alleged to have been created.

The defendants who contest the validity of the will are met by a large number of preliminary objections, some of them indeed serious. I have deemed it wiser, without being unmindful of the important bearing they might have on the issues, to brush aside what may be termed the strictly technical objections and to consider the will on its merits.

Charles G. Havens, the testator, a retired lawyer, died at the city of New York, on the 7th day of January, 1888, possessed of a large fortune. His will was admitted to probate as a will of real and personal property in September of that year and letters testamentary duly issued to Clifford A. Hand who acted thereunder until the 17th day of August, 1901, when he died. In October, 1901, letters were issued to the plaintiff who has since acted as sole executor and trustee.

The clauses of the will that have bearing on the present controversy are the following:

By the fifth clause of the will the executors are directed to pay an annuity of $100 to Emma Smith. By similar provisions in the thirteenth and fourteenth clauses annuities ranging from $100 to $250 are given to Harriet S. Allen, Maria L. Walton, Harriet Perkins and Lucinda Whitford, and by the nineteenth clause, an annuity of $1,000 is given to William Tilden. The provisions for these six annuities are substantially similar. None of them is in terms charged on any lands or specific fund, but the executors are simply directed to pay them in certain instalments. Three other annuities are created by the sixth and seventh clauses which stand on a different basis.

By the sixth clause the testator gives and devises certain lands and premises situated at Broadway and Thirtieth street in the city of New York to his executors "upon trust to receive and collect the rents, issues and profits of the said

Digitized by Google

lots of land and premises and after paying from the same any necessary and proper charges upon the property to apply the net income derived therefrom to the purposes following, namely: "My said executors are directed to apply such net income to the extent or limit of twelve hundred dollars per year to the use of my namesake, Charles G. H. Stephens, son of Amelia W. and Edgar W. Stephens, from and after my decease until he attains the age of twenty-five years and thereafter to the limit or extent of one thousand dollars per year to the use of the said Charles G. H. Stephens during his remaining natural life. And I also direct my executors to apply the said net income to the limit or extent of six hundred dollars per year to the use of Charlotte A. W. Tilden, the adopted daughter of my deceased namesake, Charlietta G. H. Tilden, during her remaining natural life in the manner however and subject to the conditions provided in the sixteenth article of this my will. And subject to the preceding provisions of this article and to the extent that it is within my power so to do I charge upon the said lands and premises and upon the net income thereof each and every the annuities payable under this my will. * * * And subject to the provisions of this item of my will and except in so far as the said lands and premises or the income thereof shall be actually applied or used to and for the satisfaction of such provisions I direct that the same disposition be made of the said lands and premises and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate."

By the seventh clause certain leasehold lands and premises situated at Fourth avenue and Nineteenth street are devised and bequeathed upon a trust similar to that in the sixth paragraph to apply the net income to the extent of $1,000 a year to the use of Amelia W. Stephens for life. Power is given to secure a renewal of the lease, which expires in 1910, or to purchase the fee, in which event the lands so purchased are made subject to the provisions of this seventh clause. "And subject to the provisions of this item of my will and except in so far as the said leasehold lands and premises or the fee if acquired thereof shall be actually applied

Digitized by Google

or used to and for the satisfaction of such provisions I direct that the same disposition and application be made of the said leasehold lots of land and premises or the fee if acquired thereof and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate. And in case and to the extent that the income so applicable to the use of the said Amelia W. Stephens shall not be equal to the annual sum of one thousand dollars throughout the period of her natural life from and after my decease then and in such case and out of my general estate my executors are directed to make good and pay in quarterly or other convenient instalments the deficiency or amount necessary to ensure to her such annual sum."

The seventeenth clause of the will makes general provision for all the annuities in the following language: "My executors are authorized to set apart and safely invest and keep invested such sums as in their reasonable discretion they shall deem proper to secure payment of the hereinbefore mentioned annuities and annual sums and meet any of the provisions of this my will except and to the extent that the same are hereinbefore adequately provided for. And whenever and as each or any fund set apart or provided for these purposes ceases to be needed therefor I direct that the same disposition or application be made of the same or of any remainder thereof as is hereinafter provided for or in respect of my residuary estate."

Of the annuitants mentioned, Allen, Walton, Whitford and Tilden are dead. The leasehold premises on which the Stephens annuity is made a primary charge have been run at a loss; they do not yield any net rent; their value is continually decreasing, the leasehold having only six years more to run, and the fee is not purchasable.

The testimony shows that the testator exhausted but a very small portion of his property in the bequests and the provisions for the annuities. The great bulk of his estate is sought to be passed either under the twentieth or twenty-first clauses which read as follows:

"*Twentieth.* All the rest, residue and remainder of my estate and property, real and personal and wheresoever sit-

Digitized by Google

uate of or to which I may die seized possessed or entitled I give devise and bequeath the same to my said executors upon trust to sell and dispose of the same and convert the same into cash or cash securities or investments and pay over the net proceeds thereof to the 'Havens Relief Fund Society' a corporation organized under the laws of the State of New York (of which I am and from its beginning have been a trustee) to be held and applied by the said Society for the purposes of the incorporation thereof it being my wish however that the principal be kept invested and only the income distributed or expended for the charitable purposes of the Society. And in this residuary property shall pass and be included all estate and funds and property which by decease of legatees or from other cause shall not be actually required to satisfy the hereinbefore contained provisions of this my will and all principal sums which shall cease to be required to produce and pay annuities or other charges or sums.

"*Twenty-first.* In case by disability of the beneficiary or from other cause the last preceding clause or item shall fail to take effect so as to pass to or to the use of the said 'Havens Relief Fund Society' my residuary estate or the proceeds thereof or all or any part or parts of the same I give devise and bequeath said residuary estate and any and every part thereof which shall fail to be actually applied to the purposes indicated in the last preceding item of my will unto the persons named and who first qualify as my executors and John D. Jones and William H. H. Moore and the survivors and survivor of them absolutely and in fee. And this devise and bequest is in the confident belief that they will apply any estate and property so vesting in them in accordance with my wishes but is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title."

The twenty-second clause appoints executors, first nominating Charles B. Moore and Clifford A. Hand, to be succeeded in the event of death or disability by the plaintiff and three others. The wish is expressed that Mr. Hand should in the first instance alone qualify and act as executor and trustee unless Mr. Moore should see fit to join him, and that in case Mr. Hand should cease or decline to act then the plaintiff

Digitized by Google

should qualify and act alone. Provision is made that if the office should become vacant and not be filled in the manner indicated, the New York Life Insurance & Trust Company should be executor and trustee.

The twenty-third clause grants a very broad power of sale as to all the real estate of which the testator "may die seized * * * provided however that the power of sale or mortgage or leasing given by this item of my will shall not be exercised so as to prejudice or limit the trusts and provisions contained in the preceding items of my will respecting my real estate on Thirtieth Street or on Fourth Avenue and Nineteenth Street * * *. And I also specially authorize my executors in their discretion and in case it shall seem to them necessary or most expedient to do so to sell and transfer my leasehold lots and premises mentioned in the seventh item of my will and in that case they are to invest and hold the proceeds upon and for the same trusts and purposes as are provided in respect to the said premises." Express power is given to exercise the power of sale in the form of a conveyance to "The Havens Relief Fund Society" for nominal or other consideration.

The twenty-fourth clause declares the intent that the result be no intestacy as to any part of the estate and in case of the invalidity of any provision the property which might therefor be claimed by heirs or next of kin should go to the Havens Relief Fund Society, or in the event of its disability to the persons designated in the twenty-first clause.

A codicil is annexed to the will and executed concurrently with it which has no bearing on the present controversy as it was intended to become effective only in the event that the testator died within two months of its execution. The will is dated the 20th day of July, 1886, while the testator died on the 7th day of January, 1888.

I believe I have cited with sufficient detail all the provisions of the will that have any bearing on the questions raised on the trial. Such reference to the evidence as may be necessary will be made hereafter.

The fundamental question in this case centers in the twentieth clause. Is the gift to the Havens Relief Fund

Digitized by Google

Society valid? The obvious intent of the testator was that it should be the ultimate and chief beneficiary. If the twentieth clause makes legal disposition of the residuary estate the validity of the substitutional gift in the twenty-first clause becomes a question for academic discussion merely. Naturally, therefore, the primary attack of the heirs and next of kin is directed against the gift to the society. Briefly, the argument in support of their claim, stated in one way or other in the various briefs, reduces itself to this. The attempted incorporation of the society by the certificate filed for that purpose was void, it not being for any of the purposes provided by law; it was in effect a trustee corporation, created as part of a testamentary scheme with objects that were wholly uncertain, indefinite and void. Having no valid legal existence it could not take property of any kind in any manner, and a subsequent special act of the Legislature assuming to extend the limit to the amount of property the society could take or hold did not recognize the validity of the incorporation or infuse validity into it, inasmuch as it must be assumed that the Legislature was merely extending the power of an existing corporation and did not contemplate the creation of a new legal entity.

I fail to find this argument supported either by reason or authority.

Preliminarily it may be observed that the argument that the formation of this society was part of the testamentary scheme fails. The society had its inception in 1871; the testator died in 1888. It may be conceded that the society was incorporated so that the testator might leave to it the bulk of his property in consummation of a long-cherished plan of original and novel charitable disposition consonant with his view of existing charitable needs. It may also be conceded that the testator made many wills from 1871 to 1886, and that each contained clauses substantially similar to the twentieth and twenty-first of his last will. But when we speak of a testamentary scheme we can consider only the intent of this last will. Brown v. Quintard, 177 N. Y. 159. The prior ones have ceased to be his testament. The society which he caused to be incorporated had been in existence for

Digitized by Google

almost two decades when he died and for fifteen years when his will was executed. The testimony shows that during his lifetime he had given it money in excess of $25,000. Under such circumstances the argument that the society, incorporated in 1871, was part of the testamentary scheme of 1886 becomes pointless.

Now as to the main question. I am of the opinion that the Havens Relief Fund Society is a duly constituted domestic corporation. The incorporators assumed to organize under chapter 319 of the Laws of 1848. Section 1 of that act provided that "Any five or more persons of full age, citizens of the United States, a majority of whom shall be citizens of this state, who shall desire to associate themselves for benevolent, charitable, scientific or missionary purposes, may make, sign and acknowledge * * * a certificate in writing in which shall be stated * * * the particular business and objects of such society." The statute does not define the terms "benevolent" or "charitable;" it does not limit the statement of the business or objects with reference to those terms and it contains no declaration of public policy limiting the very broad terminology used. We have no legislative definition of charity in this State since the repeal of the Statute of Charitable Uses (Fowler Charitable Uses, Trusts & Donations, 69), and such judicial interpretation as is to be deduced from the cases would seem to define that as a charity which contemplates a public benefit, or the well-being of a community or a class, as contrasted with the beneficial use for a private purpose or for a private individual. "To constitute a charity the use must be public in its nature." Sherwood v. American Bible Society, 1 Keyes, 561, 566. It seems to me that the statement of the "particular business and objects" of the Havens Society falls within the definition. The certificate, which was executed on the 31st day of December, 1870, and filed, approved by a justice of the Supreme Court, according to law, in the office of the Secretary of State, on the 3d day of January, 1871, states the purposes as follows: "That the particular business and objects of such society shall be the receipt of such money and property as shall be

Digitized by Google

voluntarily contributed, paid, conveyed, devised, bequeathed or in any way transferred to the society and the investment of the same to produce an income, and the application of the income from time to time through corporate or private agencies to the relief of poverty and distress, and especially the affording of temporary relief to unobtrusive suffering endured by industrious or worthy persons, but including the bestowal and distribution of any part of such income to and among benevolent and charitable institutions, objects or persons, such as shall be deemed most useful and deserving or judicious, considering the different modes of application and expenditure or use of funds, and the practical results, and including the right to employ and superintend almoners, without being required or undertaking to act immediately or directly as almoners, and generally in respect to any property received by deed or will for any benevolent or charitable use or purpose, including the right to comply with the directions of the donor in regard thereto."

To call the purposes here declared anything else than benevolent or charitable seems to me to be a perversion of the ordinary and usual meaning of language. It is claimed that this is an investment corporation. But the investment of moneys is not given as one of the objects of the corporation; it is not for the gain and profit of the incorporators but solely as an incidental power for the better carrying out of the declared charitable objects. The investment is merely for the purpose of producing an income to be applied to the corporate purposes. "Persons seeking to form a corporation under any general law must have a reasonable latitude as to what they may insert in their certificate of incorporation. They must insert therein all the matter particularly required by the law, and they may insert other provisions not inconsistent with law or public policy which are germane to the purposes of the corporation, and necessary, convenient or appropriate to the accomplishment of such purpose. If they keep within such limits the public authorities have no reason to interfere, the interests of the public are not jeopardized, and the rights of no citizen are violated." People ex rel. Fairchild v. Preston, 140 N. Y. 549, 552. I

Digitized by Google

find nothing in this certificate "inconsistent with law or public policy." Merely because the declared purposes are very broad in their scope and in part, perhaps, a bit indefinite, does not affect the validity of the incorporation as such. We are not discussing gifts to charitable uses as they existed when the society was organized and which required definite and ascertainable beneficiaries. In the incorporation of a charitable society the law does not require the ultimate recipients of the bounty to be minutely and precisely identified. It requires that the use shall be public, that the benefits shall be intended not for individuals as such but as representatives of a class; that the announcement of the altruistic aim shall not be a cover for the bestowal of a private bounty. A certain amount of indefiniteness is of the very essence of the purpose of every charitable corporation. Broadly speaking the present certificate contemplates the distribution of bounty directly to industrious and worthy persons, and, also *directly,* to charitable institutions, corporate or private. The Havens Society remains none the less the direct dispenser of charity because it bestows its largesse on other charitable institutions. There is no question involved, so far as I can see, of any delegation of authority. The Havens Society does not cast the performance of its functions on others. The corporation is invested with discretionary powers in the selection of the objects of its bounty. It does not delegate this power. It could not, perhaps, delegate this discretionary power of selection. The *exercise* of the very power of selection, set forth in its certificate, is in no sense a *delegation* of that power. The contemplated gifts are not direct to persons or to other charitable institutions. There is no room for the application of the maxim "*Delegata potestas non potest delegari.*" I am of the opinion that the certificate alone was sufficient to effect a valid incorporation.

If, however, I am wrong in this conclusion, I am of the opinion that the subsequent act of the Legislature with reference to the society validated the incorporation, or alternatively, created a valid corporation in the first instance. Within four months of the filing of the certificate an act

Digitized by Google

was passed, being chapter 301 of the Laws of 1871, whose primary object, as appears from the title, undoubtedly was to remove the limit to the amount which under then existing law the corporation might take and hold, but which in addition shows a recognition and sanction of the powers sought to be assumed, if not an express authority. As the act is, to my mind, controlling of the question under discussion I quote it in full.

"SECTION 1. The Havens Relief Fund Society, incorporated under the laws of this State, and whose purposes or business and objects are the receipt of such money and property as shall be voluntarily contributed, paid, conveyed, devised, bequeathed, or in any way transferred to the society, and the investment of the same to produce an income, and the application of the income, from time to time, through corporate or private agencies to the relief of poverty and distress, and especially the affording of temporary relief to unobtrusive suffering, endured by industrious or worthy persons, and including the bestowal and distribution of any part of such income to and among benevolent and charitable institutions, objects or persons, such as shall be deemed most useful, and deserving or judicious, considering the different modes of application and expenditure or use of funds, and the practical results, and including the right to employ and superintend almoners without being required or undertaking to act immediately or directly as almoners, and generally in respect to any property received by deed or will, for any benevolent or charitable use or purpose, including the right to comply with the directions of the donor in regard thereto, is hereby authorized to receive by gift, devise, bequest, subject to all provisions of law relative to devises and bequests by last will and testament, or other voluntary contributions, any money or property, and to so apply the same to the said purposes of its incorporation, or any or either thereof, without being limited to the amounts now limited by law, and to continue the incorporation so long as may be requisite thereto; provided, however, that the amount of such contributions which may be so received from persons other than those named in the certificate of its incorporation, shall not

Digitized by Google

exceed the limit allowed by law for gifts or contributions to associations or incorporations for benevolent and charitable purposes.

"§ 2. This act shall take effect immediately."

It will be observed that this act contains a verbatim recital of the purposes and objects of the society as stated in the certificate and impliedly repeats them when the society is specifically "hereby authorized" to receive any money or property and apply it "to the *said* purposes of its incorporation or any or either thereof." This comes very close to an express authority to receive and use property for the named purposes. The addition of the clause "without being limited to the amounts now limited by law," while doubtless the motive for the enactment of the statute should not, in view of the particular language adopted, be held to negative the legislative intent to permit the use of the property or money for the "said purposes." The Legislature had all the essential facts before it. If there was any informality or irregularity in the proceedings attending the making, filing and executing of the certificate, the recognition of the existence of the society by the act of 1871 would be deemed to have waived and cured it, as the power prescribing the formalities had the right to dispense with them. Black River & Utica R. R. Co v. Barnard, 31 Barb. 258; Syracuse City Bank v. Davis, 16 id. 188; White v. Ross, 15 Abb. Pr. 66. But here, so far as essentials are concerned, there is no necessity for deeming anything waived — everything is expressed. No purpose or aim of the corporation was concealed. Every power that it specially claimed under its certificate was recited in the statute and in effect repeated in the enacting clause. Even on a narrow construction it is to be said that the Legislature, apprised and approving of the corporate objects, extended the limits to take and hold for those very objects. Why then is this sanction not a ratification or an incorporation for those very objects? I find nothing in the existing law to the contrary. If the Legislature could by special act create such a corporation, and this I do not understand to be questioned, why should the assent given with full knowledge of the facts not have the same force and effect?

Digitized by Google

"The existence of a corporation formed without legislative authority may be legalized by the subsequent assent of the legislature. For this purpose it is not necessary that an act be passed investing the association with corporate franchises by express terms; but it is sufficient if the legislature recognizes, and thereby ratifies, the franchises which have been claimed." Morawetz Priv. Corp., § 20. It has been held for instance that a plain recognition by the conferring power of the capacity to take and hold land would confer that power even if it had not previously existed. Society for the Propagation of the Gospel in Foreign Parts v. Town of Pawlet, 4 Pet. 480, per Story, J.

Furthermore, the act of 1871 is so complete in itself that, waiving formalities, it may be not improperly regarded as an act of incorporation, even if we take the extreme view that the certificate filed completely failed of its purpose. Unless there is a constitutional requirement, no certain forms are necessary to effect a grant of corporate franchises. No express words are requisite, but by implication a corporation may be deemed to be created. Any expression whatsoever showing the legislative intention to confer the right to exercise corporate franchises is sufficient and "this intention may be deduced from the whole of the legislative act. The use of the word 'incorporate' or a similar expression is not necessary." Morawetz Priv. Corp., § 18; Town of North Hempstead v. Town of Hempstead, 2 Wend. 109; Thomas v. Dakin, 22 id. 91, 102; Walsh v. Trustees of New York & Brooklyn Bridge, 96 N. Y. 427, 436.

The legislative intent in the act of 1871 must be apparent to him who reads. Had the act simply said in effect, "The Havens Relief Fund Society, incorporated under the laws of this State, is hereby authorized to take and hold property and money without being limited to the amount now limited by law," there might be some force in the argument that the Legislature was misled, that it supposed it was extending the power of a society legally incorporated, and that, if the incorporation was void, the extension of powers that did not exist was necessarily ineffectual. But that is not this case. The Legislature was not misled. In its enactment

Digitized by Google

it stated, and must, therefore, be deemed to have considered, ratified and approved every purpose and object of the society; it expressly authorized the society to receive and apply property without limit for the "said purposes." In the absence of constitutional inhibition the act was equivalent to assent, if not to a formal incorporation. I find no such restriction in the State Constitution. Section 1 of article VIII provides: "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws." This provision of our Constitution has been retained unaltered from article VIII, section 1, of the amended Constitution of 1846. It does not require that corporations must be formed under general laws; it is not mandatory but permissive (Matter of Taxpayers of Kingston, 15 Barb. 657; United States Trust Co. v. Brady, 20 id. 119; People v. Bowen, 30 id. 24; affd., 21 N. Y. 517), and it is well settled that whether a special act of incorporation is necessary or not, is a matter entirely for the judgment and discretion of the Legislature and that the courts have no power to review its action in this regard. Metropolitan Bank v. Van Dyck, 27 N. Y. 400, 448.

I hold, therefore, that the Havens Relief Fund Society was a duly constituted domestic corporation. Without amplifying further, I state my conclusion to be that under the act of 1871 and the amendment of chapter 319 of the Laws of 1848, it had the power to take and hold what the testator chose to devise and bequeath to it.

It had the capacity to take. It remains to consider briefly the gift to it. At great length the heirs and next of kin argue that the gift under the twentieth clause creates a charitable trust; that the devise and bequest is for indefinite and uncertain purposes; that the estate is to be kept invested in perpetuity and merely the income distributed; that there are no persons or institutions sufficiently ascertained that could be held to have the right to enforce its alleged purposes or objects; and that the law in relation to charitable trusts as it existed when this will took effect and as it now exists

Digitized by Google

in relation to perpetuities makes such a gift to a trustee void.

The many cases cited in support of the contentions are unquestionally sound law and not to be disregarded by an inferior court. But I find none of them applicable. The vice in the argument lies in the assumption of the creation of a charitable trust. No such trust is established. There is no gift to charitable uses. There is simply a gift outright. The testator, an experienced lawyer, evidently recognized that since charitable donations have been subjected to the common rules against perpetuities, "corporate donees engaged in the business of charity have been regarded as the safest conduits of benevolence and benefactions." (Fowler Charitable Uses, Trusts & Donations, 69), and that as long since stated in Yates v. Yates, 9 Barb. 324: "Trusts are unnecessary for public charities; direct grants are much better." A gift to a charitable corporation for its corporate purposes, as here, is not a trust in the eyes of the law (Fowler, *supra,* 72, 84; Wetmore v. Parker, 52 N. Y. 459; Vail v. Long Island R. R. Co., 106 id. 283; Bird v. Merklee, 144 id. 544), and the direction that the principal be kept invested in perpetuity and only the income used runs against no statute or public policy. The argument of the heirs on this point can best be answered by the language of the Court of Appeals in Bird v. Merklee, *supra,* where it is said: "The fundamental error in this case * * * and in cases that are frequently coming to the attention of this court, is the failure to recognize the fact that gifts to religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense, do not offend against the statute of perpetuities, are not to be judged by any of the well-known rules pertaining to the law of trusts as applied to private individuals."

Some minor questions are raised under the twentieth clause which I do not deem it important to consider. I have reached the conclusion that the "net proceeds" which under it the executors were to turn over to the Havens Relief Fund

Digitized by Google

Society constituted a valid gift to a valid corporation empowered to take.

In this view it becomes unnecessary to consider at length whether or not the substitutional gift in the twenty-first clause creates a secret and hence void trust.

A few words, however, may be said in passing. I find myself in accord with the conclusion of the surrogate, who, on admitting this will to probate, held without discussing the twentieth clause, that the twenty-first created no secret trust. Matter of Havens, 6 Dem. 456. While his decision does not control the determination of this action, at least so far as the realty is concerned, I see no occasion to question his views. The testimony on this point was read in evidence from the probate proceedings and nothing additional was offered. The heirs and next of kin rely on a line of cases of which Matter of O'Hara, 95 N. Y. 403; Amherst College v. Ritch, 151 id. 282, and Edson v. Bartow, 154 id. 199, 215, are the leading examples. A careful consideration of those and kindred cases, applied to the facts at bar, fails to establish the offensive trust asserted. I do not propose to review the whole evidence but merely to single out what I regard as controlling features. It is only as to Mr. Hand that a secret trust could possibly be asserted. Mr. Hand testified, and his word is not even remotely impugned, that he never saw the testator's last will until after the latter's death and that he had no conversation with the testator about the twenty-first clause. Mr. Havens drew the will himself and the original on file is in his handwriting. To fasten a secret trust on a fund it must spring from the intention of the testator and from the promise, express or implied by silent acquiescence or tacit consent, of the legatee. Amherst College v. Ritch, *supra;* Edson v. Bartow, *supra.*

The only intent of the testator which we can consider is that of his last will (Brown v. Quintard, 177 N. Y. 75); the only promise, that made with reference to the last will. Previous instruments had ceased to be testamentary in character. But even as to these previous instruments, provided it is proper to consider them at all, Mr. Hand testified before the surrogate that he was very positive that no promise had

Digitized by Google

under discussion, that he had indicated no intention of carrying out Mr. Havens' wishes, but that on the contrary he had told the latter "that such a clause as that would make the legatees and devisees entirely at liberty to take the property to themselves." Mr. Hand saw the will of 1884, but was not present nor consulted about the execution of the will of 1886 — the one under discussion — and stated categorically: "I did not know the contents of this will as executed until it was opened after his death." I fail to find room for any implied promise in these undisputed facts. In the Edson case, *supra,* mainly relied on by the heirs and next of kin, the will and codicil were prepared under the supervision of the legal adviser of the testatrix, who attended to the execution of the codicil made necessary by impending death, within forty-eight hours of his client's decease, reading it to her and stopping at the end of each clause until she nodded assent. These seem to be the determining facts which the Court of Appeals held justified opposing inferences and on which the Appellate Division had based its determination, binding on the higher court, that the attorney took the legacy resting under the implied promise to carry out the wishes of the testatrix. Such or similar facts are absent here. Mere knowledge on the part of Mr. Hand that the will of 1886, which he had not seen, was likely to have a provision containing a substitutional gift to him falls very short in my opinion of any implied promise, whatever his determination may have been as a gentleman of honor to deal with the Havens Society in a manner that would have met with the approval of his testator.

Were the twentieth clause of the will void, I should have little hesitancy in declaring the twenty-first valid.

The substantial questions involved in this contest are disposed of in the foregoing. Certain minor points should be noticed.

It is claimed that the trusts created for the benefit of the several annuitants provide for an unlawful suspension of the power of alienation, contravene the statute against perpetuities and are, therefore, void. In support, reference is had to the sixth clause of the will, and it is urged that the

Digitized by Google

testator has charged nine annuities upon the Thirtieth street property thus preventing its sale until the last annuitant had died with the result that the trust created by that clause suspends the power of alienation for nine lives. The argument is unsound. The provisions with regard to the annuities are most carefully drawn, and clearly show, to my mind, a knowledge by the draughtsman of the legal rules applicable and an intent to stay within them. As has been pointed out in the summary of the will quoted, the annuities have been provided for in two ways. Three of them are to be paid by applying the net income of designated properties — two out of the net income of the Thirtieth street fee and one out of the net income of the Nineteenth street leasehold — and the remaining six annuities by a simple direction to pay the respective sums in quarterly or other convenient instalments. This difference of method indicates a difference of intent. It is not necessary to discuss the question of the alienability or inalienability of the six annuities as they are not payable out of rents and profits as such or made a primary charge on anything. The provision of the sixth clause of the will, "and subject to the preceding provisions of this article and to the extent that it is within my power so to do I charge upon the said lands and premises and the net income thereof each and every the annuities payable under this my will," distinctly contemplates by the limitation "to the extent that it is within my power so to do," a situation in which these six annuities cannot be so charged, and in this aspect the provision is to be regarded not as mandatory, requiring the charge in any and every event, but merely as alternative. The testator did not attempt to tie up his property in the sixth clause beyond two lives. The net income is to be applied first to a stated amount to the use of Charles G. H. Stephens, and then to a further stated amount to the use of Charlotte A. W. Tilden. There the testator stops. At most it can be said that the power of alienation is suspended during two lives. No further application of the net income as such is directed. The subsequent provision charging all annuities on this property to the extent that was in his power discloses an unmistakable

Digitized by Google

intent that if legal rules prevent such a charge then it shall not be made, and that the six annuities shall stand as independent gifts, supported by independent trusts if need be. If there were any doubt on this question the seventeenth clause would remove it. There the executors are authorized to set apart such sums as they shall deem proper to secure payment of all the annuities "except and to the extent that the same are hereinbefore adequately provided for." The Stephens and Tilden annuities are adequately provided for. The six annuities are not, if the testator had not the power to charge them. They are to be supported as independent provisions payable out of the general estate or by the setting apart of specific sums. It is a question whether, during the lifetime of Stephens and Tilden, all the annuities may not be paid out of the surplus income. If we regard those two lives as the measuring ones, we can apply the rule stated in Schermerhorn v. Cotting, 131 N. Y. 48: "A testator may, in the creation of a trust, suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being, and with this limitation, during that period, he may provide for the distribution of the annual income among as many different persons and for as many successive lives as he sees fit." That the testator adopted the particular phraseology of the sixth clause may well be taken to disclose an accurate knowledge of decided cases and a desire to provide for all contingencies. Certainly at the time the will was drawn, and perhaps even now (see Cochrane v. Schell, 140 N. Y. 516, 531–535): "The line of distinction between a trust to pay annuities and a trust to apply income is often very shadowy, and the principles of discrimination do not appear to have been clearly determined." Chaplin Suspension of the Power of Alienation, § 233. "The importance of the distinction is that the latter trusts * * * invariably occasion suspension, while annuities, in so far as they may be classified as legacies, or as successive payments of sums in gross, are releasable and assignable, and do not occasion suspension." Ibid. See Hawley v. James, 16 Wend. 60; Lang v. Ropke, 5 Sandf. 363; Radley v. Kuhn, 97 N. Y. 26; Cochrane v. Schell, *supra;* Bull v.

Digitized by Google

Odell, 19 App. Div. 605. Which, if any, of these trusts is alienable it is not necessary to discuss. The point is that the testator apparently had the distinction between the two classes in mind, and, while expressing his preference, carefully limited the trust estates created so as to run counter to no rule of law. The Thirtieth street property is tied up for two lives only; the Nineteenth street property for one life only, and the six annuities have independent provisions of sufficient legal weight to support them.

A word as to the Amelia W. Stephens annuity charged on the Nineteenth street leasehold is necessary. The testimony shows that the property has been run at a loss and that the income is, therefore, insufficient to pay the annuity. The provision of the seventh clause that in the event of deficiency the amount should be insured the annuitant out of the general estate should, therefore, be invoked and a sum set apart by the executors pursuant to this and the seventeenth clauses.

The complaint also asks that the will be construed as to whether it directs the unlawful accumulation of income, asks for instructions as to whether the Thirteenth street property should be sold, and prays the appointment of a referee to settle the accounts of the plaintiff.

So far as I can see no question of unlawful accumulation of income is presented. No accumulation is directed by the sixth and seventh clauses, while under the twentieth, unexpended income goes at once, though necessarily at different times and in different amounts, to the Havens Relief Fund Society.

So far as the sale of the Thirtieth street property is concerned, I am in accord with counsel for the society in his suggestion that this question shall be deferred until the coming in of the referee's report on the accounting, so as to give an opportunity for the fuller developments of the facts bearing on the advisability of a sale at the present time. The portions of the twenty-third clause of the will quoted permit the sale of this property with a proviso, similar to that applicable to the Nineteenth street property, that the proceeds be held to satisfy the trusts created.

Digitized by Google

All parties join in the request for the accounting. The entry of an interlocutory judgment will, therefore, be directed in conformity with the views herein expressed and providing for the appointment of a referee to take and state the accounts of the plaintiff.

Judgment accordingly.

Matter of the Estate of EMMA S. FAILE, Deceased.

(Surrogate's Court, New York County, August, 1904.)

A trust in favor of a child not living at the testator's death is void — When a trust, void as to one of several beneficiaries, will be enforced in respect to the others — When the property bequeathed upon a void trust does not pass under the residuary clause.

A will directed the payment of the income of a trust fund to one of the testatrix's sons during his life and provided that upon his death the principal thereof should be divided into as many shares as he might leave children him surviving. It created trusts in each of such shares for the benefit of each of the children so surviving during their respective lives. The life beneficiary died after the testatrix, leaving him surviving two children, one of whom was born during the lifetime of the testatrix and one of whom was born after her death.

Held that the trust for the life of the child born after the death of the testatrix was void because it would effect a suspension of the power of alienation for a life not in existence at the time of the death of the testatrix;

That, as it was apparent from an inspection of the will, that the testatrix did not intend to make an equal division of her estate among the beneficiaries, the invalidity of the trust did not disturb the general scheme of distribution to such an extent as to require that the whole or any part of the legacies to children or other grandchildren of the testatrix should fall;

That, as the testatrix, when describing the residuary estate in the residuary clause of the will, expressly excluded the trust fund, the invalid trust fund would not pass under the residuary clause, but that the testatrix died intestate in respect thereto.

PROCEEDINGS upon the accounting of an executor. Objections to accounts.

Digitized by Google

Omri F. Hibbard, for executor.

Thos. H. Rothwell, for executrix (objector).

Charles H. Brush, for other objectors.

Edward W. Sheldon, for U. S. Trust Co.

THOMAS, S. The trust, as to $22,125, created by the sixth clause of the will, so far as it directs payment of income to William H. Faile during his life, is valid. The direction that, upon his death, the principal be divided into as many shares as he might leave children him surviving, if such division is followed by a lawful disposition of any one of the shares, is valid. Each share is to be used to set up a separate and distinct trust, one for the benefit of each of such children. William H. Faile died after the testatrix, leaving two children, Dorothy, born during the lifetime of the testatrix, and Esther, born after her death. The division must, therefore, be made into two parts, and two trusts are to be set up. The trust for the life of Dorothy is valid. The trust for the life of Esther is void, because it will effect a suspension of power of alienation for a life not in existence at the time of the death of the testatrix.

The same observations will apply to the trusts for William H. Faile and his children, created, or attempted to be created, by subdivision 2 of the eighth clause of the will; and the provisions therein contained for the benefit of Dorothy are valid, while those for Esther are void. It is quite apparent that by this necessary conclusion an intent of the testatrix is defeated, and that a granddaughter is deprived of a provision for her support which she desired to make for her, but I cannot agree that any general scheme of distribution is so far disturbed as to require that the whole or any part of the legacies to children or other grandchildren of the testatrix should fall with the one invalid trust. It is quite true that the testatrix carefully provided for a division of her estate into three equal parts, and that, in a broad sense, she desired that one of these shares should be

Digitized by Google

enjoyed by each of her children and their descendants. But, after this division was made, she was guided by no rule of equality as to the way the several shares should reach the objects of her bounty. As to her daughter, a considerable sum which had been set apart for her during the life of the testatrix was given to her absolutely, together with jewelry, clothing and household effects, in excess of one-third of the estate, while the balance was bound by a trust for the life of the daughter, but with remainder to the children of the daughter absolutely. As to one son, advancements had been made during the life of the testatrix, and the balance of his share was bound by a trust for the life of the son, with remainder to a specified child of the son, conditional upon his continued life, and with a contingent ultimate remainder to the daughter and the other son of the testatrix or the survivor. As to her son William, all that was set apart for him was bound by a trust for his life; all of his children were to have trust interests for their respective lives, and the ultimate remaindermen were to be the daughter and the other son of the testatrix or the survivor. It will be observed that there was no identity of provision, even as to the children of the testatrix, and that no general plan or scheme included all of her grandchildren. The children of the daughter were to inherit the mother's share; one specified child of one son was to have his father's share, if he lived to enjoy it; the children of the other son were, under no circumstances, to have more than the income of their father's share during their respective lives, and the principal was eventually to go to the daughter and the other son of the testatrix or their descendants or legal representatives. Under such circumstances it would manifestly be improper to set aside the carefully devised provisions of the testatrix in order to reach equality of division, when it is plain that equality was not intended by her.

The property which would have passed to Esther under the void trust created by the sixth clause of the will, does not fall into the so-called residue, and is not controlled by the provisions of the eighth clause, because what is therein called the residue is described in the eighth clause, and the entire

Digitized by Google

fund covered by the sixth clause is expressly excluded. As to this the testatrix died intestate. She was also intestate as to the fund otherwise passing in trust for Esther under the eighth clause. The remainders as to the property which would have been operative after the trusts for the life of Esther fall with those trusts.

George E. Faile, a son of the testatrix, is still alive, and is entitled to the income of the share of the estate set apart for him under the eighth clause of the will. My jurisdiction to construe the will is limited by the necessities of the present accounting, and I cannot now determine what will be the rights of the parties in the contingency that George E. Faile should die before Edward Hall Faile shall have reached the age of 25 years.

In view of the amount and character of the services performed by the attorney for the executor, I will find as a fact that those services were reasonably worth the amounts paid him, and will overrule the objections to such payments. The other objections were withdrawn on the hearing before me.

Decreed accordingly.

Matter of the Estate of JAMES FINN, Deceased.

(Surrogate's Court, New York County, August, 1904.)

Savings bank accounts — An account "James Finn in trust for Mary Finn" belongs to Mary Finn — An account "James Finn or Mary Finn" — What proof establishes title in Mary Finn — A surrogate may not decide, as between an administratrix, as an individual, and a third person, an issue as to the title to property.

Mary Finn, whose name prior to her marriage to James Finn was Mary Myers, was on his death appointed administratrix of his estate, and thereafter withdrew moneys from savings bank accounts standing in the following names: "James Finn, in trust for Mary Finn, his wife;" "James Finn, in trust for Mary Finn," and "James Finn or Mary Finn," the latter account consisting of moneys transferred from an account which had formerly stood in the name of "James Finn, in trust for Mary Myers."

Digitized by Google

Held that the money so withdrawn did not belong to the decedent, and that the widow could not, as administratrix, be charged therewith.

A surrogate has no jurisdiction, in proceedings for the judicial settlement of the accounts of an administratrix, to pass upon an issue of title to property arising between the administratrix, as an individual, and third parties, when neither party alleges that the part in dispute forms part of the estate to be administered, but both insist that the decedent parted with title thereto prior to his death.

PROCEEDINGS upon the judicial settlement of the accounts of an administratrix.

Joseph I. Green, for petitioner.

New & Gilchrist, for contestants.

THOMAS, S. I will find as a matter of fact that the administratrix was the lawful wife of the decedent, and that she is now his widow, and that her former husband died prior to her marriage with the decedent. The account of the administratrix cannot be surcharged with the sum of $3,154.38 drawn by her from the account in the Bowery Savings Bank in the name of "James Finn, in trust for Mary Finn, his wife," or with the sum of $1,097 drawn by her from the account in the Seamen's Bank for Savings in the name of "James Finn, in trust for Mary Finn," for the reason that those sums were presumptively her property (Matter of Mueller, 15 App. Div. 67; Robertson v. McCarty, 54 App. Div. 103). Neither can she be charged with the sum of $819 drawn from the Metropolitan Savings Bank, being the balance due on an account opened in the name of "James Finn or Mary Finn." It affirmatively appeared that this account was opened on July 3, 1901, by a deposit of $1,455.28, which was transferred from a former account in the same bank in the name of "James Finn, in trust for Mary Myers." The name of the administratrix before her marriage to the decedent was Mary Myers, and the moneys so transferred belonged to her under the authorities above cited. The subsequent drafts from that account ex-

Digitized by Google

ceeded the deposits, and the balance at the time of the decedent's death was $819 only. On these facts and on the authority of Mulcahey v. Emigrant Industrial Savings Bank (89 N. Y. 436), I must determine that this balance did not belong to the decedent.

The suggestion on the argument that the decedent was liable as the general guardian of one of his sons for property in his hands as such guardian raises no question that could be passed upon in this proceeding, even if a formal objection had been permitted to be filed upon that ground. The claim, based upon the argument that some of the money collected by the widow was the property of certain of the children by reason of trust deposits made by the decedent years before his death, is not made by the objections filed. It could not be considered here even upon due objections, because a surrogate has no jurisdiction to pass upon an issue of title to property between an administrator as an individual and third parties, when neither party alleges that the property in dispute forms part of the estate to be administered, but both insist that the decedent parted with title thereto prior to his death. The claim of the administratrix as an individual in resisting the claim that the property received by her is part of the estate to be distributed may be determined under section 2731, Code Civil Procedure. The account will be approved as filed. No costs will be awarded to either party.

Decreed accordingly.

WILLIAM SPRING, Respondent, v. CHARLES S. MILLINGTON, Appellant.

(County Court, Herkimer County, August, 1904.)

Credibility of witnesses — When the jury may not disregard uncontradicted testimony.

Although, upon a jury trial, the credibility of a witness presents a question for the jury, yet when the defendant and one of his witnesses, who are in no way discredited, testify to a fact within their own knowledge, which is not of itself improbable, or in conflict with other evidence, the fact is to be taken as legally established and cannot be disregarded by the court or jury.

Digitized by Google

Misc.] County Court, Herkimer County, August, 1904.

APPEAL from a judgment rendered in Justice's Court, October 10, 1903, in favor of plaintiff and against defendant for the sum of twenty dollars damages and seven dollars and thirty-five cents costs.

Charles Bell, for appellant.

George M. Wirt, for respondent.

DEVENDORF, J. This action was brought to recover a balance of five dollars on a three hundred dollar contract and for extra work and material to the amount of thirty dollars and fifty-five cents. The answer contained a general denial, plea of payment and alleges damages for breach of contract by way of set-off and counterclaim.

The contract mentioned was in writing and plaintiff agreed thereby to move a barn for the defendant from one farm to another and to place the same upon a stone-wall, masonry foundation at the westerly end of a barn on the premises; the floors to be on the same level. There were other provisions in said contract and it was provided further that the work was to be performed in a good, substantial, workmanlike manner.

The plaintiff upon the trial of the case established a cause of action against the defendant, and if the case rested upon plaintiff's proof as to the cause of action alleged in his complaint, the judgment could be safely affirmed; but the defendant introduced proof showing that the plaintiff failed to perform the contract. Among other things the uncontradicted evidence of the defendant and his witness shows that the plaintiff failed to do the work in a workmanlike manner. He did not put the barn moved up against the other barn, neither was it made water tight where joined. One of the posts that held the purlin plate lacked several inches of touching the foundation. The floors were not level. The flooring was not properly laid. The wall was not substantial or workmanlike in its construction. The siding was improperly put on.

Hence it appears by the evidence introduced on the part of the defendant that plaintiff failed to perform his contract

Digitized by Google

in substantial particulars and damages to a substantial amount resulted to the defendant.

The plaintiff utterly failed to contradict the defendant's evidence in that regard. I do not think the justice had a right to absolutely overlook such proof as was submitted by the defendant upon that branch of the case, as the same was neither contradicted nor disputed by plaintiff. The plaintiff appears to have been present in court and sworn in his own behalf and yet failed to say otherwise than as had been shown by defendant, that he had failed in the particulars above mentioned to perform his contract and that the damages alleged by the defendant consequently resulted.

The rule is well settled that where unimpeached witnesses testify distinctly and positively to a fact and are not contradicted the jury are not at liberty to disregard their testimony. Elwood v. Western Union Tel. Co., 45 N. Y. 549; Kavanagh v. Wilson, 70 id. 177.

When a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable or in conflict with other evidence, the witness is to be believed and the fact is to be taken as legally established, so that it cannot be disregarded by the court or jury. Lomer v. Meeker, 25 N. Y. 361; Howe & Hummel v. Schweinberg, 4 Misc. Rep. 73.

The credibility of a witness is a question for the jury, but a jury is not at liberty to disregard the evidence of any witness, which is in nowise impeached *and whose testimony is such that its truth is highly probable.* Denton v. Carroll, 4 App. Div. 532.

It may well be said that the truth of the evidence of the defendant and his witness, Metzler, in this case is highly probable; they testify in what respects the plaintiff failed to perform his contract, also their opinion as to the amount of the damages; the plaintiff is sworn in his own behalf and does not say but that he left the barn in the same condition as described by the defendant and Metzler.

It further appears from the defendant's evidence that he had a conversation with the plaintiff in which plaintiff stated that he would go up then (in the spring) and make it right.

Digitized by Google

As above stated the testimony of the defendant and Metzler was not contradicted or sought to be; they were not impeached, and there is no circumstance in the record which tends to impeach their credibility, and under such circumstances the justice was not at liberty to disbelieve them, but should have given their evidence weight and rendered judgment accordingly. Van Nostrand v. Hubbard, 35 App. Div. 201.

After a careful examination of the case, I am satisfied that a reversal is the proper and legal judgment to be rendered herein, and the judgment is reversed accordingly.

Judgment reversed.

JOHN H. McDOWELL, Respondent, *v.* THE SYRACUSE LAND & STEAMBOAT CO. et al., Appellants.

(County Court, Onondaga County, August, 1904.)

Motion for a nonsuit — It must be made at the end of the case as well as at the end of the plaintiff's proof — The fact that the defendant's proofs did not change the situation is immaterial.

Where, at the close of the plaintiff's case, the defendant makes a motion for a nonsuit, and, after excepting to the denial thereof, proceeds to put in his proof, if he neglects to renew his motion for a nonsuit at the close of all the evidence, he will be deemed to have waived his previous exception and to admit that the evidence is sufficient to warrant the submission of the case to the court or jury.

In such a case it is not material that the evidence given upon the part of the defendant did not change the situation from that existing at the close of the plaintiff's evidence.

APPEAL by the defendant from a judgment in favor of the plaintiff. Action to foreclose a mechanic's lien.

Stone, Gannon & Petit (A. H. Sheldon, of counsel), for said defendant the Syracuse Land & Steamboat Company, appellant.

John H. McCrahon, for respondent.

Digitized by Google

EGGLESTON, J. The plaintiff herein brought this action for the foreclosure of a mechanic's lien, making the Syracuse Rapid Transit Company, the Syracuse Land & Steamboat Company and others defendants.

Upon the submission of the case, the court gave judgment for the Syracuse Rapid Transit Railway Company against the plaintiff, and gave judgment in favor of the plaintiff against the defendant, the Syracuse Land & Steamboat Company, for the sum of $742.13, being the amount of the plaintiff's claim allowed, together with costs of the action.

The defendant, the Syracuse Land & Steamboat Company, appeals from the judgment rendered.

From the reading of the evidence, it is apparent that the plaintiff proceeded, upon the trial, with the purpose of recovering judgment against the Syracuse Rapid Transit Railway Company and endeavoring to make that company liable for the amount of damages, which it is claimed the plaintiff sustained, and it is equally noticeable that the defense, upon the trial, substantially lost sight of the other defendants and turned all of its force and skill toward the defeat of the recovery of the judgment against the defendant, the Syracuse Rapid Transit Railway Company.

The trial court has found, as matter of fact, that the evidence shows that Mr. Gannon and Mr. Connette were the agents for the Syracuse Land & Steamboat Company, and had authority to authorize and consent to the improvements which were made upon the lands of the steamboat company, and that the improvements made had inured to the benefit of the company, and, as there is some evidence tending to prove that fact, though slight, it may be said that that question of fact has been found in favor of the plaintiff. Certainly the judgment rendered is according to the equity of the case, and, if possible, should be sustained.

The defendants, the Syracuse Rapid Transit Railway Company and the Syracuse Land & Steamboat Company, united in their answer in the action and appeared by the same attorneys.

For a period of years it would seem that the business of the steamboat company had received but little attention, if

Digitized by Google

any, at the hands of the officers of the company. Mr. Kuntzsch, who seems to be about the only remaining officer of the company, and who was at one time its secretary, is not quite sure whether he is now an officer or not. He states that he would not be sure whether he had ever resigned his office, that there was some talk about having the matter closed up, and that he suggested that the matter be closed up and that the company have new officers elected. Whether it was done or not he could not say, or whether he resigned he could not say, but, so far as he did know anything about it, there had never been any new officers elected. It is admitted, however, that Mr. Kuntzsch is vice-president of the company, and it can be safely said that, as such officer, he did not give attention to the business of the company. At one time he was upon the premises of the company and saw the improvements that were being made, but paid no particular attention to them.

Ninety-two of the one hundred shares of stock of the land and steamboat company were negotiated and purchased for the railway company, Mr. Kuntzsch assisting to that end.

It is very evident that, for several years past, and at the time the improvements were made upon the lands of the steamboat company the business affairs of the company were controlled exclusively by the officers of the railway company. The evidence very substantially shows this fact.

Mr. Gannon was president of the railway company and Mr. Connette vice-president and general manager of the company, and, during the time the improvements were being made, frequently visited the property, and the plans of the proposed improvements were submitted to them. In fact, they seemed to have entire control of the work which was taking place, in pursuance of the contract made for the improvements.

The witness Robinson testified upon the trial to a conversation had between Gannon and Connette at the time of the signing of the lease, which conversation shows quite conclusively that they were giving directions and instructions as to the improvements to be made upon the lands of the land and steamboat company, which lands were controlled by the

Digitized by Google

railway company. He says: "Mr. Gannon and Mr. Connette both explained. They told me to take the land and any land I wanted between the railroad tracks there, it virtually belonged to them. I went to Mr. Gannon and asked him for instructions. He said take any of it or all of it. They came up and examined the improvements and they said 'we compliment you on the work and the way you are getting along.' They were there a number of times."

While it may be said that this evidence as to the conversations with Gannon and Connette was objected to, it is a significant fact that it was only objected to as not binding on the railway company. No objection was made to it as against the land and steamboat company, though the same attorneys were appearing for both companies. It is not apparent why it was objected to upon the part of the defendant appealing, unless it is to be construed as a concession that the land of the company virtually belonged to them and that they had the right to direct the improvements to be made.

Other evidence of like character and force was given by the witness without any objection. "Q. Where is the property that Mr. Gannon and Mr. Connette told you they particularly owned and you could use it? A. They said they owned everything between the railroad tracks, down from the line of the railroad to the water front. Q. What did they say? A. They said they controlled the property from the railroad, from the B. & O. railroad, to the Iron Pier building and down as far as the mouth of Onondaga Creek.' Q. What else did they say? A. They said go ahead and take possession of it, I would not be interfered with at all, they controlled all of that property, pay no attention to this street."

In the lands referred to are included the lands of the defendant. If objected to by the defendant appealing, it would have been error to have received this evidence, and it is not easy to understand why objection was not made, unless it was conceded by the defendant that Gannon and Connette had the right to speak for and bind the defendant in the matter, especially when considered in the light of the fact that the defendant railway company and the defendant land and steamboat company appear in the action by the same

Digitized by Google

attorneys, who object to only a portion of the evidence as against the railway company alone.

Another fact which shows, upon the trial, a tacit admission of the liability of the defendant, the land and steamboat company, is the very loose and indefinite motion for a nonsuit made at the close of the plaintiff's testimony, as that motion seems to be confined to a motion made by the railway company, and was not intended to be a motion for a nonsuit in favor of the defendant, the land and steamboat company.

So that, from the evidence given upon the trial, the court might find, as matter of fact, that, under the existing circumstances in the case, the ownership of the stock of the land and steamboat company, the manner in which its business has been conducted for some time, the evidence received of the acts of Gannon and Connette, without objection, that they were acting for the land and steamboat company, and that the improvements made were really made for the benefit of the land owned by the land and steamboat company, but equitably owned by the stockholders of the railway company, and that they were agents with power to act in the matter.

While the record does not disclose just what disposition of the nonsuit was made, it may be inferred that it was denied, as the defendant immediately proceeds to the giving of testimony upon the part of the defense. At the close of the evidence no motion was made, upon the whole evidence, for a nonsuit, and the case was submitted upon the evidence. From this course of procedure it may be taken for granted that the defendant admitted that there was evidence sufficient to warrant the submission of the case upon the facts presented, and if that fact has been decided adversely to it, it cannot prevail upon this appeal.

In the case of Hopkins v. Clark, 158 N. Y. 299, the court has, with a purpose and intent to do so, settled the practice on this point and stated the rule as follows: "The rule laid down by the Supreme Court of the United States seems the proper one, to the effect that when a defendant, after the close of the plaintiff's evidence, moves to dismiss,

Digitized by Google

and, the motion being denied, excepts thereto, and then proceeds with his case, and puts in evidence on his part, he thereby waives the exception, and the overruling of the motion to dismiss cannot be assigned as error."

The rule has been settled, for a long time, that a defendant, by failing to move for a nonsuit, concedes that there was a question for the court or jury to decide as between the parties. Hecla Powder Co. v. Sigua Iron Co., 157 N. Y. 437; Pollock v. Pennsylvania Iron Works Co., id. 699; Hopkins v. Clark, 158 id. 299.

It may be urged, however, that the evidence given upon the part of the defendant did not change the situation of the case from what it was at the close of plaintiff's evidence and thus relieve the defendant from the rule referred to.

There was no well-defined motion for a nonsuit for the defendant appealing made upon the trial, and, even if the motion made is to be considered as a motion made in favor of both defendants, then the rule referred to in this case should prevail.

In the case of Hopkins v. Clark, *supra,* the court states, inferentially, that even though the evidence of the defendant did not strengthen the plaintiff's case, but, on the contrary, weakened it, still the rule referred to should be followed.

This appeal presents a case where the judgment appealed from should be sustained, if possible, and is not a case where the court should strain for reversal. National Wall Paper Co. v. Sire, 163 N. Y. 122; Otis v. Dodd, 90 id. 336.

In reaching the conclusion that the judgment should be affirmed I am not unmindful of the somewhat guarded method of the law to prevent the taking of the property of another, under the Mechanics' Lien Law, to satisfy a lien filed for the making of improvements upon such property, unless it appears that such improvements were made with the consent of the owner; nor have I overlooked the fact that corporations are bound only by the acts and contracts done and made by their agents, within the scope of their authority given, but the law enacted for the purpose of giving the lien is a remedial statute, to be construed liberally, to secure the beneficial interests and purposes thereof, and a substantial

Digitized by Google

compliance with its provisions is declared to be sufficient for the validity of the lien.

In this case I am disposed to take the tacit admission, upon the trial, that Gannon and Connette were acting within the scope of the power given to them to act for the land and steamboat company, as they themselves stated that they had the right to use it, and thus give support to the fact which the trial judge has found in favor of the plaintiff and as against the defendant.

There are no exceptions in the case calling for a reversal of the judgment, no errors upon the trial shown to have been committed in the admission or the exclusion of evidence, and, as the judgment seems to be equitable and just, it is affirmed, with costs.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* LOUIS ZABOR, Defendant.

(Court of Special Sessions of the First Division of the City of New York, August, 1904.)

A formal written information of a misdemeanor not required in the New York Special Sessions — What the return of the magistrate must contain — The depositions need not be reduced to writing — Demurrer on the ground that an affidavit stating the offense is disjunctive — A formal complaint is necessary outside of New York city.

Where a person arrested, with or without a warrant, is held by a magistrate of the city of New York for trial at the Court of Special Sessions in that city upon a charge of misdemeanor, it is not necessary that a formal written information or any other pleading in the nature of an indictment shall be filed or returned to the Court of Special Sessions.

In such a case, it is only necessary for the magistrate to return to the Court of Special Sessions in the city of New York, "the warrant, if any, the depositions, the statement of the defendant, if he has made one, and all undertakings of bail, or for the appearance of witnesses taken by him," and even this duty is quali-

Digitized by Google

fied by subdivision 6 of section 204 of the Code of Criminal Procedure, which, in the county of New York, exempts the magistrate from reducing to writing depositions taken by him, unless the defendant, or the district attorney, shall so elect.

Consequently, where the only document in the nature of a deposition or of an information returned to the Court of Special Sessions in such a case is an affidavit stating that the charge against the defendant is that he "did unlawfully and willfully sell or give away one package of cigars known as 'Jack Rose Little Cigars' to one Edward Gluck, a male child actually and apparently under the age of sixteen years, to wit, of the age of eleven years, in violation of section 290 of the Penal Code of the State of New York," a demurrer will not lie to such affidavit because of its disjunctive averments.

Semble, that in Courts of Special Sessions outside of the city of New York there must be a formal complaint in the nature of a pleading before the defendant can be required to plead.

DEMURRER to an information.

William Travers Jerome, District Attorney, for People.

Charles H. Studin, for defendant.

OLMSTED, J. It is charged that the defendant on the 21st day of July, 1904, at premises No. 1926 Third avenue, in the county of New York, "did unlawfully and willfully sell *or* give away one package of cigars known as 'Jack Rose Little Cigars' to one Edward Gluck, a male child actually and apparently under the age of sixteen years, to wit, of the age of eleven years, in violation of section 290 of the Penal Code of the State of New York."

The defendant interposes a demurrer because of the disjunctive averments quoted, alleging that he is charged with no specific offense, and that he is not called upon to plead to the information and should be discharged.

If the information in this case were to be considered a pleading in the same sense that an indictment is a pleading, the demurrer herein would of necessity have to be allowed, and the defendant's prayer for discharge granted. Is it such a pleading? In the opinion of this court it is not. As matter of fact the affidavit containing the disjunctive aver-

Digitized by Google

ments, and to which the defendant demurs, constitutes but a part of the case on which this defendant was held for trial. There may be a question even if it has any proper place in the case, unless it may be considered as one of the depositions taken before the magistrate who held the defendant on his examination. That it is hardly such a deposition is evidenced by its form.

The Code of Criminal Procedure provides a particular practice by a magistrate in holding a defendant charged with misdemeanor for trial in this Court of Special Sessions. If the defendant has been arrested on a warrant an information must have been laid before a magistrate charging him with some designated crime (§ 145); the magistrate must have examined the informant and prosecutor and any witnesses he may have produced, taking their depositions in writing (§ 148); the depositions being sufficient (§ 149), and the magistrate being satisfied of the commission of the crime and the guilt of the defendant, he must issue his warrant (§ 150); with the arrest and arraignment of the defendant the examination of the case by the magistrate proceeds in conformity with chapter 7 of part IV, taking and authenticating testimony given by a witness as provided therein, and also taking and reducing to writing and authenticating the statement of the defendant, if he shall make one. By the provisions of section 221 of the chapter cited, and by special statute, the magistrate is required to return to this court "the warrant, if any, the depositions, the statement of the defendant, if he have made one, and all undertakings of bail, or for the appearance of witnesses taken by him." If the defendant be arrested without warrant, as in this case, the procedure as to the examination and the return is identical with that in the cases of an arrest with warrant.

It will be noted that section 221 does not require the magistrate to return the original information laid before him. It will be further noted that the provisions of chapter 7, cited, do not require, where an arrest is made without a warrant, as in this case, that there shall be any formal written information; in fact, nothing in the Code requires that the information laid before a magistrate that a crime has been

Digitized by Google

committed, and that the person named is guilty of that crime, shall be in writing. That the information need not be in writing is the undoubted reason that there exists no requirement for its return.

The affidavit in this case, containing the disjunctive averments, which the defendant treats as a pleading, and to which he demurs, bears on its face the evidence of being an attempt to lay an information against the defendant, already arrested, charged with a specific crime. It need not have been drafted at all, and there was no necessity under the law for the magistrate to return it to this court. All that the magistrate need have done was to have followed the provisions of section 188 *et seq.*, of chapter 7, cited, and if satisfied that a crime had been committed, and that there was sufficient cause to believe the defendant guilty of the crime, to hold him for trial in this court, and to make return of the depositions, the statement of the defendant, undertakings, etc., as provided by section 221.

It will be seen, therefore, that there is not necessarily such a thing as a formal pleading in the nature of an indictment in cases held for trial in this court by the city magistrates. That which takes the place of the indictment in the case of felony is the return of the magistrate under the provisions of section 221 of the Code of Criminal Procedure. Included in this are the warrant, if there be one, the depositions of the witnesses taken on examination before the magistrates, and the statement of the defendant, if he has elected to make one. Of course, the undertakings referred to in the section are required to be returned for another reason, and could be no part of the pleading, if it is to be dignified by the title. Thus we have had in this court no pleading in form that bears any close analogy to an indictment. Papers have been returned to us in cases by the magistrates which have had a close resemblance to indictment pleadings, but, as has been indicated, there was no necessity in law for such return, unless they may have been considered and treated as depositions within the meaning of section 221 of the Code of Criminal Procedure. Having no pleading therefor which is analogous to an indictment, the practice and procedure applicable to

Digitized by Google

indictments have very little to do with the practice and procedure affecting charges of misdemeanor pending in this court. What we would have before us in place of an indictment, if returns were made to us as required by section 221 of the Code of Criminal Procedure, would be the depositions of the complainant and witnesses and the statement of the defendant, reciting certain facts tending to establish or refute charges that the defendant was guilty of some specific offense, which must of necessity be the crime for which the defendant was held by the magistrate for trial in this court. If the depositions and statement present sufficient evidentiary facts to spell out the offense charged, the defendant should be placed on trial.

It may be said in this case, which is the fact, that no depositions have been returned to us, other than the affidavit which has already been referred to, and that we must determine from that affidavit alone that the defendant is not charged with a specific crime, and, therefore, should not be called upon to plead. This contention might be true were it not for the provision of subdivision 6 of section 204 of the Code of Criminal Procedure, which exempts the magistrate from reducing testimony taken on an examination before him in writing as a deposition and authenticating it in the county of New York, excepting the defendant, the district attorney or his representative shall so elect. If the defendant's contention were upheld and the city magistrates merely made return as required by law whenever they held a defendant for trial, there would probably be ninety per cent. of the cases in this court in which the court could assume no jurisdiction because there was not sufficient and definite cause of action stated. As matter of fact the percentage of cases in which no depositions taken on examination are returned by magistrates is much greater than ninety per cent., and the only facts tending to establish the commission of the crime by the defendants in these cases, aside from the action of the magistrates, are to be found in the affidavits, similar to the one in question, which affidavits are not required by law to be returned to this court, and may, therefore, be properly considered as not of the case.

Digitized by Google

If the rule contended for by this defendant were upheld there would be a failure of justice in the matter of nearly every case of misdemeanor where a defendant was held to answer in this county.

It cannot be that our lawmakers contemplated such a result. They intended that criminals should be brought to justice; nor did they intend that any of the rights of criminals as individuals should be infringed; nor are they infringed with the practice as it exists.

Let us consider the position of this defendant and see if he has been or is to be prejudiced in any way by a requirement to plead to the charge for which he was held by the magistrate. He was arrested by a peace officer; he was taken before a city magistrate, and there informed of the charge against him, and of all his rights thereunder; the right to counsel; the right to examine the complainant against him; the right to examine all the witnesses produced on behalf of the People; the right to produce witnesses and to make a statement in his own behalf. This afforded him an opportunity to know to the minutest detail with what he was charged and with what evidence the People purposed supporting that charge on the trial. This complaint was not born of a secret inquiry like an indictment. The defendant does not have to resort to the single affidavit in this case to ascertain the exact nature of the charge against him; he knows exactly what it is; he can claim no surprise. Even though the affidavit referred to is to be considered as the indictment hereon on which he is charged he cannot be prejudiced in the slightest degree if it be amended so as to conform to the facts as adduced on the trial.

It might be contended that this court cannot take jurisdiction on a return of this character by a magistrate. Where is the merit in that contention when the magistrate has returned even more than he is required to return by law? The defendant can only be tried on the charge for which the magistrate held him. If *any* crime was committed that will be determined on the trial; it cannot be determined on this demurrer.

This case is distinguished from the case of People v.

Digitized by Google

Pillion, 78 Hun, 74, and People v. Miller, 81 App. Div. 255, because the practice in this court is peculiar to the city and county of New York and differs radically from that in the courts wherein these cases were tried.

In the Miller case it was decided that the Recorder's Court, city of Elmira, had no jurisdiction to try the defendant on a defective complaint. The decision in the Pillion case was practically to like effect concerning the police court in the city of Albany. Both courts were Courts of Special Sessions for the trial of these particular cases, but the practice in both of them was and is radically different from that in this court. In Courts of Special Sessions outside of the city of New York the charge against the defendant is required to be distinctly read to him, whereupon he must plead thereto, and if the trial proceeds it proceeds on that original complaint. Of necessity where such practice prevails the charge must be one of a specific offense against the defendant. If it is not and the complaint be defective the court has no jurisdiction to try him thereon. In the Miller case and in the Pillion case there was no preliminary examination by a magistrate, as in the case under consideration. All the facts which constituted the crime had not been elicited on examination. The defendant in each of these cases had no means of knowing with what they were charged, excepting as the crime was set forth in the original complaint, to which they were compelled to plead.

In the Court of Special Sessions in the city of New York the defendant is called upon to plead to a criminal charge which has been the subject of judicial inquiry by a competent magistrate after a thorough examination into all the facts, which have satisfied that magistrate that there is sufficient cause to hold him for trial, all his rights being conserved under the law. If he is convinced that any of his rights have been infringed by the action of the magistrate he has his remedy by writ. Not having availed himself of that remedy the defendant herein seeks to apply the technical rules of pleading applicable to indictments in his case in this court, notwithstanding that all that is required by statute has been

Digitized by Google

done by the magistrate in the return of this case to give this court jurisdiction.

Briefly, then, the situation as to the so-called pleading in this court is this: It consists simply of the return of the magistrate; that return, under the provisions of the law, may consist (no deposition having been taken — Code Crim. Pro., § 204 — and no docket having been kept by the magistrate — § 220, *supra*) merely of the certificate of the magistrate that he has held the defendant, the statement of the defendant taken on the examination, if he have made one, and the undertaking of bail, should one have been given. There is nothing in such a return which need include anything in the nature of a pleading, and it may be even devoid of any recital of facts tending to show the commission of a crime or the guilt of the defendant. This court must assume jurisdiction to try a defendant where the magistrate in his return has complied with all legal requirements. The magistrate may even hold a defendant for another crime than the one for which he was arrested and arraigned and with which he was charged before the magistrate. Code Crim. Pro., § 208. If, then, there is no pleading, where is the application of practice by demurrer?

I am of the firm belief that the remedy by demurrer does not lie, and the demurrer herein is disallowed.

HINSDALE and WYATT, JJ., concur.

Demurrer disallowed.

Digitized by Google

INDEX.

ABATEMENT AND REVIVOR.
See Surrogate's Court.

ACCOUNTING.
A surrogate may not decide, as between an administratrix, as an individual, and a third person, an issue as to the title of property.— A surrogate has no jurisdiction, in proceedings for the judicial settlement of the accounts of an administratrix, to pass upon an issue of title to property arising between the administratrix, as an individual, and third parties, when neither party alleges that the part in dispute forms part of the estate to be administered, but both insist that the decedent parted with title thereto prior to his death. Matter of Finn, 622.
See Corporations.

ACTIONS.
On a foreign judgment brought by an assignee — Assignee's right to sue in his own name.— Where the validity of an assignment of an Illinois judgment is not questioned, in an action brought thereon in the State of New York by the assignee thereof, he is the real party in interest and expressly authorized by Code Civ. Pro., § 1909, to bring the action in his own name. Waters v. Spencer, 15.
See Corporations; Lis Pendens; Reference; Surrogate's Court; United States Statutes.

ADULTERY.
See Divorce.

AGRICULTURAL LAW.
See Constitutional Law.

ANNUITIES.
See Will.

APPEAL.
See Criminal Law; Municipal Court of New York.

ARBITRATION AND AWARD.
Arbitrator's determination is binding in the absence of fraud or mistake — Errors of law or of fact do not affect the award — Failure of the arbitrator to determine a matter left to him — An architect may determine whether a contract has been completed without taking testimony — Effect of one part of a several award being void — Action on a contract containing an arbitration clause.— Where parties have selected an arbitrator who is to determine the questions that arise during the performance of a contract entered into by them and upon whose certificate payments are to be made and it is provided in the contract that the determination of such arbitrator is to be binding upon the parties thereto, his determination is a condition precedent to the right of either party to recover under the contract, and, in the absence of fraud or palpable mistake, his certificate is final. In the absence of proof of

Digitized by Google

ARBITRATION AND AWARD — Continued.
corruption, bad faith or misconduct on the part of the arbitrator or palpable mistake appearing on the face of the award, neither party will be allowed to prove that the arbitrator decided wrongly as to the law or the facts. Where no adjudication has been made by the arbitrator upon a matter left to his determination, the matter will not be passed upon by the courts, in the absence of proof of unreasonableness or fraud on the part of the arbitrator. In reaching a determination as to whether a binding contract has been completed, the owner's architect, who by the terms of the contract has been made the arbitrator between the parties, is not obliged to take the testimony of witnesses. Where the award or certificate of an arbitrator is several, and a part of it is void, if that part is not so connected with the rest of it as to affect the justice of the case, the award is void only *pro tanto*. A provision for arbitration contained in a contract is not a defense to an action brought on the contract, where no demand or request for arbitration was made until the trial. Heidlinger v. Onward Construction Co., 555.

ARREST.

Motion to vacate an order of — Construction of Code Civ. Pro., § 572, providing for the defendant's discharge "if the plaintiff unreasonably delays the trial of the action".— The word "delay", as used in Code Civ. Pro., § 572, entitling a defendant under arrest in a civil action to be discharged from imprisonment "if the plaintiff unreasonably delays the trial of the action", means more than a mere neglect to proceed and must be held to intend a positive act in the way of obstruction. Where both parties to an action, in which the defendant has been incarcerated under an order of arrest, might have, but neither ever has, filed a note of issue or served a notice of trial to put the case in a position where it could be tried, the defendant cannot be heard to say, on his motion to vacate the order, that it should be vacated because the plaintiff has unreasonably delayed the trial. Goff v. Charlier, 28.

See **Courts of Special Sessions; Criminal Law.**

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Power of the Supreme Court to punish the assignee for contempt in disobeying a decree for the payment of money.— The Supreme Court has concurrent jurisdiction with the County Court to exercise the power, conferred by L. 1894, ch. 134, of punishing for a contempt of court an assignee for the benefit of creditors who willfully neglects to obey a final decree for the payment of money, with a certified copy of which decree he has been previously personally served. Matter of Merklen, 169.

ASSOCIATIONS.

1. *Action in equity by members of a membership corporation, illegally suspended, to restrain the controlling faction from using or disposing of the corporate property except as provided in the certificate of incorporation and from excluding the plaintiffs from the rooms and the meetings — Disciplinary action of such a corporation when valid — When a suspension and an expulsion are illegal — The rights of such a corporation are derived from its charter and not from the constitution it may adopt — Such a corporation when organized to maintain a club for social and literary purposes cannot lawfully pledge its support to a political party or suspend or expel a member for withdrawing his support from that party — Unconstitutional interference with the right of suffrage — When the action will lie in equity — Inadequacy of the remedy at law.*— No disciplinary action taken by a membership corporation will be valid unless taken as prescribed by its bylaws and the statutes governing its procedure. A suspension of certain of its members attempted to be made at a meeting of members, not called by a

Digitized by Google

ASSOCIATIONS — Continued.
quorum of seven of them and upon notice to all members as required by the bylaws of the corporation, is not a meeting of the corporation and it can take no corporate action. A member of such a corporation entitled to rights of property or privileges therein cannot be expelled therefrom without being given notice of the charge preferred and an opportunity to be heard in his defense. The members of such a corporation derive their rights primarily from the charter or certificate of incorporation, the bylaws adopted in conformity therewith and the statutes regulating such a corporation, and any constitution subsequently adopted by the corporation — which constitution is merely part of the bylaws — must be consistent with the certificate of incorporation. A certificate, stating the objects of such a corporation to be the maintenance of a club for social and literary purposes, affords the corporation no authority or power to adopt a constitution, bylaws and rules, pledging the members always to support a certain political organization, not to belong to or support any other political party, declaring that any member expelled for treason to that political party should not be reinstated under any circumstances and that, in case of struggle, dispute or conspiracy in the ranks of the society, seven members abiding by the constitution of the political organization should be a sufficient number to constitute themselves the society and control its property — as these provisions are not consistent with the social and literary purposes for which the corporation was organized. Moreover, it is unreasonable that a member of a corporation incorporated for such purposes should be subject to expulsion because he does not hold a certain political faith; and, additionally, the object sought to be effected by these bylaws is contrary to section 1 of article 1 of the Constitution of the State of New York, providing that "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." Bylaws which compel a member to give up, under penalty of expulsion, the free exercise of his right of suffrage, conflict with the above constitutional provision. Members of such a corporation, when illegally suspended for alleged disloyalty to the corporation in that they had withdrawn or threatened to withdraw their support from the political organization which the corporation was pledged to support, and when thereafter excluded from the club and its meetings, may maintain an action in equity against the members in possession and control to enjoin them, declare void their unauthorized acts, compel such administration of the corporate affairs as is orderly and prescribed and prevent a diversion of its assets to any purpose other than that for which the corporation was organized. The remedy at law, by an action against the individual defendants for damages or a mere direction to recognize the plaintiffs as members, would be inadequate. Stein v. Marks, 140.

2. *Unincorporated — Removal of member.*— Where a person's election to office came from an unincorporated association itself, his removal therefrom can be accomplished only by the association. A person cannot restrain officers of an association where he has not been recognized by it. Tanner v. Ranken, 488.

ATTACHMENT.
See Sheriffs.

ATTORNEYS.
When a person is not one within Code Civ. Pro., § 73.— A person, who, although admitted to the bar in 1893, never filed with the clerk of the Court of Appeals the certificate required by L. 1899, ch. 225, or had a law office or practiced law except for about a year after his admission to the bar, cannot be deemed an attorney within Code Civ. Pro.,

Digitized by Google

ATTORNEYS — Continued.
§ 73, prohibiting an attorney from buying a thing in action with the intent and purpose of bringing an action upon it, and therefore where the person buys a promissory note to bring an action on it — for a purpose which would be lawful in the case of any individual — and gets another attorney to sue the note, the maker of it cannot defend under Code Civ. Pro., § 73. Thompson v. Stiles, 334.

See **Judgment; Lien.**

BANKRUPTCY.
See **Judgment; Sheriffs.**

BANKS.
See **Negotiable Instruments.**

BASE BALL.
See **Sunday.**

BEQUEST.
See **Will.**

BILL OF PARTICULARS.
1. *Not exactible by the plaintiff where the defendant pleads payment — Meaning of "claim," in the last clause of Code Civ. Pro., § 531 — When a defense presents no question of the amount and an order for a bill should be refused.*— Where a defendant interposes to a complaint, stating two causes of action for moneys alleged to have been advanced, paid out and loaned by the plaintiff to the defendant, first, a general denial, and, as a second defense to both causes of action, payment, the plaintiff is not entitled to a bill of particulars of the payment. One construction of the word "claim," used in the concluding clause of Code Civ. Pro., § 531, authorizing the court to make an order directing "a bill of the particulars of the claim of either party to be delivered to the adverse party," in the case of a defendant, is the position he takes in his pleading as the reason why judgment should not go against him. A third defense interposed in the action, which was brought by a wife against her husband, alleging that the moneys covered by her first two causes of action were advanced, etc., by her under an ante-nuptial agreement made between the parties, to the effect that, after marriage, she would contribute her income, and he his earnings (whatever they might be) to support the family, and that he had fully performed this agreement upon his part by contributing his earnings, while adding strength to the answer and constituting a claim, does not entitle the plaintiff to an order for a bill of particulars of this defense and this because no question of amount is presented by the defendant's allegations in the defense that he had contributed his earnings. Swan v. Swan, 163.

2. *Return when insufficient.*— When the plaintiff serves an insufficient bill of particulars, the defendant need not move for a new bill, but may return the one served with a notice endorsed thereon that it is insufficient and wherein insufficient. Faller v. Ranger, 424.

See **Municipal Court of New York.**

BILL OF SALE.
Given for the vendor's future support.— A bill of sale, the consideration of which is the support and maintenance of the vendor during the remainder of his life, is void as to his creditors under section 23 of the Personal Property Law. Cullin v. Ryder, 485.

Digitized by Google

BOARDS OF HEALTH.

Public Health Law (L. 1893, ch. 661, §§ 21, 25) — Power of a town board of health to suppress an alleged nuisance.— Unless it appears that there is a nuisance to be suppressed a town board of health can take no action concerning the matter under the Public Health Law (L. 1893, ch. 661, §§ 21, 25). Where an owner of premises adjoining an unoccupied hotel in a town tears up part of a private hotel drain running therefrom to the highway and into an open ditch and to the front of the owner's premises, the town board of health cannot collect of him a fine it imposed upon him for obstructing the drain against its rules and the expense of restoring it upon his neglect to do so after having been ordered to restore it, where no proof has been made before the board that the obstructed drain was a nuisance, where the owner of the adjoining premises has never been notified to appear before the board and answer any complaint in the matter, where he never has had any notice to appear before the board and show cause why he should not be ordered to remove the obstruction, and where the board has never examined the *locus in quo*. Town of Fayette v. Greenleaf, 352.

BRIDGES.

Highway — Liability of adjoining towns, divided by a stream, for the cost of constructing a bridge over the same — It exists whether the stream runs along or traverses the dividing line.— Section 130 of the Highway Law provides, "The towns of this state, except as otherwise herein provided, shall be liable to pay the expenses for the construction and repair of its public free bridges, constructed over streams or other water within their bounds, and their just and equitable share of such expenses when so constructed over streams or other waters upon their boundaries * * * and when such bridges are constructed over streams or other waters forming the boundary line of towns, either in the same or adjoining counties, such towns shall be jointly liable to pay such expenses." Section 134 of the Highway Law provides, "Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of such towns, without reference to town lines." Section 136 of the Highway Law provides, "Whenever any adjoining towns shall be liable to make or maintain any bridge over any streams dividing such towns, whether in the same or different counties, three freeholders in either of such towns may, by petition signed by them, apply to the commissioners of highways in each of such towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, rebuild or repair such bridge within a reasonable time, either for want of funds or any other cause, such freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of the commissioners, at least eight days before the hearing, may apply to the supreme court at a special term thereof." *Held* that the term "streams dividing such towns," used in section 136 was intended to be synonymous with the term "streams upon their boundaries," used in section 130, and that the remedy afforded by section 136 extended to all cases in which liability was imposed by section 130. That section 136 applies to a case where the stream does not run along the line dividing adjoining towns, but traverses such line. Matter of Town of Madrid, 431.

BUILDING AND LOAN ASSOCIATIONS.

Loan to a member — His property rights upon its insolvency — Interest — Dues — Premium.— Where a person, desirous of getting a five per cent. mortgage on his premises paid off, enters in 1897 into an agreement with a building loan bank company by the terms of which it agrees to carry the mortgage, pay interest on it in the meantime and the principal upon maturity of the stock, and he agrees to pay it a premium, monthly dues on the stock in the meantime, give it a six per cent. mortgage for the amount of his mortgage and the premium,

Digitized by Google

BUILDING AND LOAN ASSOCIATIONS — Continued.
pay interest on that until the maturity of the stock and assign his stock to it, and these stipulations are mutually performed by the parties until a permanent receiver of the property of the company is appointed in 1903 upon its insolvency, and thereafter the subscriber to the stock petitions the court that the receiver pay him the difference between what he has paid in and the company has paid out, the court, in view of the fact that he is not only a borrower from the company but also a member of it, will give him no interest on any sum allowed him, will credit him with the dues he has paid as constituting a basis to fix his share of the net assets as a stockholder but will allow the receiver to retain the dues, and allow the company such proportionate part of the premium — which must be deemed to have been earned to some extent by it — as the period before insolvency and during which it kept its contract bears to the entire term of the contract. People v. New York Building Loan Banking Co., 296.

CALENDAR.
1. *First Judicial Department — Special term calendar — Preference where an administratrix is the sole party defendant — Distinction as to preferences on the trial and special term calendars.*— Where an administratrix moves under Code Civ. Pro., § 791, subd. 5, for a preference on the special term calendar as being the sole party defendant in the action and the motion is made on the papers and proceedings and pleadings and a copy of the latter is on the motion handed up to the court, it has before it unquestionable proof that the administratrix is the sole party defendant and therefore entitled to the preference, and the rule, of some cases, that a right to a preference will not be inferred from the mere fact that the title of the action indicates that the plaintiff or defendant is an administrator, has no application. The further rule, that the statutory preference given by said section cannot, without some additional reason, be permitted to advance an action on the trial term calendar of the First Judicial Department over issues noticed for trial at prior trial terms, does not apply to any extent to the special term calendar in that department, as the latter calendar is kept up to date while the former is much behind in the disposition of actions pending. Jackson v. Jackson, 44.

2. *When a case was not at issue when the plaintiff served a notice of trial — Service by publication.*— A defendant served by publication may, before the service is completed, appear and demand a copy of the complaint, if one has not been delivered to him personally, notwithstanding one was served on him by mail, and his time to answer runs from the time of the service of the complaint in compliance with such demand. Where service of the complaint is made after service of notice of trial by the plaintiff, the case is not at issue, the service of the notice is unauthorized and the case, where the plaintiff has put it on the calendar, must be stricken therefrom on the defendant's motion. Sanders v. Peoples' Co-operative Ice Co., 171.

3. *Filing of note of issue before service of notice of trial.*— A case should not be stricken from the calendar merely because the attorney filed his note of issue before he served his notice of trial, where both acts were done by him on the same day, and this because the law does not often take account of fractions of a day. Lederer v. Adler, 217.

4. *When an action at law becomes equitable and proper to be put on the special term calendar — Preference where an administrator is sole plaintiff.*— An action at law becomes equitable and triable by the court where the sole original defendant, an insurance company holding a fund all of which the plaintiff claims and none of which the insurance company claims, interpleads, and makes a defendant, another claimant

Digitized by Google

CALENDAR — Continued.
of the fund; and where the sole plaintiff is an administrator he is thereafter entitled to put the case on the special term calendar and have it preferred under Code Civ. Pro., § 791, subd. 5. Vandewater v. Mutual Reserve Life Insurance Co., 316.

CARRIERS.
In New York city notice of the arrival of goods transported may be given the consignee by a postal card.— Although it is the duty of a common carrier to deliver goods transported or give the consignee timely notice of their arrival, the notice need not, in the city of New York, be conveyed by a messenger, there being in that city a recognized local custom to use postal cards in such a case. Roth Clothing Co. v. Maine Steamship Co., 237.

See **Negligence.**

CERTIFICATE OF DEPOSIT.
See **Negotiable Instruments.**

CHARITABLE SOCIETIES.
See **Will.**

CHATTEL MORTGAGE.
Failure to renew — Who cannot take advantage thereof.— The failure to file in due time a renewal of a chattel mortgage does not render such mortgage void as against a subsequent chattel mortgagee who had actual notice of the existence of the prior mortgage. Cullin v. Ryder, 485.

CITY OF HORNELLSVILLE.
See **Justice's Court.**

CITY OF NEW YORK.
1. *Interest, on an award for property condemned, when title is vested in the city before confirmation of the commissioners' report.*— When, under the provisions of the charter of the city of New York, the city takes property in advance of the termination of the condemnation proceedings and before confirmation of the commissioners' report, the commissioners have no power to assess any part of the interest allowed to the property owner, as compensation for such preliminary taking, upon such property owner. Matter of City of New York, 126.

2. *Cause of action — When entire, can be the subject of one action only — Brooklyn — Power to reduce a salary in the department of city works.*— Where a clerk in the department of city works of the city of Brooklyn, entitled before consolidation in 1898 to a salary of $1,500 payable monthly, after being retained in office in 1898 but in that year reduced to $1,200, subsequently removed and reinstated, assigns his salary for the seventeen months he was out to his counsel and at the rate of $100 per month, the latter's recovery of the city on that basis bars the clerk from further recovering of the city $25 per month from the time his salary was reduced in 1898 and this because the debt is entire. Although the charter of the city of New York gives the deputy and not the commissioner of the said department power to reduce a salary, a reduction is valid where the commissioner directs it and the deputy actually makes it. Hartmann v. City of New York, 272.

3. *Revocation of theatre license — "New York Sabbath Committee."*— Where no more information as to the corporate powers of the "New York Sabbath Committee" is afforded on a motion made by the committee, under section 1476 of the charter of the city of New York, to revoke a license granted by the city to a city theatre, because of an al-

Digitized by Google

CITY OF NEW YORK — Continued.
leged violation of the provisions of title 2 of chapter 22 of that charter, than the fact that the committee is a domestic corporation, the application must be denied as there is nothing to show that the act is within the corporate powers of the committee. Matter of New York Sabbath Committee, 422.

See **Civil Service; Courts of Special Sessions; Criminal Law; Railroads; Schools; Taxes.**

CITY OF ROCHESTER.
See **Municipal Corporations.**

CITY OF TROY.
See **Constitutional Law; Office and Officer.**

CIVIL SERVICE.
1. *Civil war veterans — They are, by Laws of* 1904, *chap.* 637, *excepted from the general rule that a city official illegally removed cannot recover the salary paid to his successor before the city had knowledge that the removal was illegal — Such statute is not unconstitutional.* — The general rule is that where a city official has been illegally removed and another person has been appointed in his stead, payment of the salary incident to the office to the *de facto* incumbent, prior to the receipt by the city of notice of the illegality of the removal, furnishes a complete defense to a claim for such salary on the part of the officer illegally removed. Veterans of the War of the Rebellion have been excepted from the operation of this rule of law by chapter 637 of the Laws of 1904 which provides that a veteran of the War of the Rebellion unlawfully removed from any position held by him by appointment or employment in the State of New York, or in the several cities thereof, and who shall have been restored to such position or employment by a peremptory writ of mandamus as authorized by section 21 of the Civil Service Law "shall receive from said state or the city, county, town or village thereof under which said position or employment was held by him, the same compensation therefor from the date of such unlawful removal to the date of his said restoration to said position or employment which he would have been entitled by law to have received in such position or employment but for such unlawful removal." The said statute does not contravene section 10 of article VIII of the Constitution of the State of New York, which prohibits the giving of any money or property of a city to or in aid of an individual; nor does the statute violate section 9 of article V of the said Constitution, providing for appointments and promotions in the civil service of the State and all the civil divisions thereof, in that the statute relates to compensation and not to appointment or promotion and, therefore, is not authorized by the Constitution. People ex rel. Blair v. Grout, 526.

2. *Comparison clerk in the New York county clerk's office — He is a public officer — Mandamus is not the proper remedy for reinstatement in the office when another person holds it — Change of civil service rule making a competitive place noncompetitive — It is a judicial act — Not set aside by mandamus.* — A comparison clerk in the office of the county clerk of New York county is a public officer in the civil service of the state. Such an officer cannot, after being removed, litigate, in mandamus proceedings, his claim to the office, while another person is holding the office under color of right and is in receipt of the salary attached thereto. In changing the civil service rules by transferring a particular position from the competitive to the noncompetitive class, the state civil service commission acts in a judicial capacity and such action cannot be reversed or set aside in mandamus proceedings. People ex rel. O'Toole v. Hamilton, 577.

See **City of New York; Stenographers.**

Digitized by Google

CLUBS.
See **Associations.**

CODE OF CIVIL PROCEDURE.
§ 52. Matter of Town of Hadley, 265.
§ 73. Thompson v. Stiles, 334.
§ 501. Gause v. Commonwealth Trust Co., 46.
§ 531. Swan v. Swan, 163.
§ 533. Guarino v. Firemen's Insurance Co., 218.
§ 572. Goff v. Charlier, 28.
§ 791. Jackson v. Jackson, 44.
§ 791, subd. 5. Vandewater v. Mutual Reserve Life Ins. Co., 316.
§ 983. Mendoza v. Rose, 241.
§ 1268. Matter of David, 516.
§ 1311. Hyman v. Segal, 226.
§ 1391. Meyer v. Halberstadt, 408.
§ 1525. Barson v. Mulligan, 26.
§ 1674. Shandley v. Levine, 23.
§ 1709. Wright Steam Engine Works v. New York Kerosene Oil Engine Co., 580.
§ 1784. Raymond v. Security Trust & Ins. Co., 31.
§ 1843. Hughes v. Golden, 128.
§ 1909. Waters v. Spencer, 15.
§ 2471a. Matter of Brearton, 247.
§ 2732, subd. 3. Matter of Hardin, 441.
§ 2732, subd. 12. Matter of Hardin, 441.
§ 2934. Raynes v. Bloom, 81.
§ 2942. Pough & Co. v. Cerimedo, 246.
§ 3365. Schenectady R. Co. v. Lyon, 275.

CODE OF CRIMINAL PROCEDURE.
§ 204, subd. 6. People v. Zabor, 633.
§ 256. People v. Bills, 348.
§ 276. People v. Rathbun, 88.
§ 313. People v. Bills, 348.
§ 773. People ex rel. Patterson v. Flynn, 20.

COMMUTATION.
See **Convicts.**

COMPLAINT.
See **Courts of Special Sessions; Pleading.**

CONDEMNATION PROCEEDINGS.
Condemnation Law — When a proceeding thereunder becomes a distinct proceeding as to each owner, justifying a separate judgment as to each and to each successful owner costs as a matter of right.— Where a railway company seeks to condemn, in a proceeding taken under the Condemnation Law, real property held in severalty by the defendants, and some of them default in the proceeding, some appear and consent to condemnation, others appear and object to the jurisdiction and still others answer under Code Civ. Pro., § 3365, but not by the same attorneys, the proceeding constitutes, in effect, as many distinct proceedings as there are owners of distinct parcels and this justifies a separate judgment as to each and entitles each successful owner to costs as a matter of right. Schenectady R. Co. v. Lyon, 275.
See **City of New York.**

CONSIDERATION.
See **Deeds.**

Digitized by Google

CONSPIRACY.
See Criminal Law.

CONSTITUTIONAL LAW.
1. *Agricultural Law — Constitutionality and construction of L.* 1902, *ch.* 30, *relative to tagging shipped carcasses of calves.*— Section 70f, added to the Agricultural Law with section 70e by L. 1902, ch. 30, making it unlawful "to ship to or from any part of this state" any carcass of a calf unless there is attached thereto a tag stating the name of the person who raised the calf, the name of the shipper, the points of shipping and the destination and the age of the calf, was intended by the Legislature to apply to every shipment of carcasses of calves to or from any part of this State, no matter whether the calf, when slaughtered, was within the age of four weeks, prescribed by section 70e, or whether the shipment was to some point in another State. The statute is not violative of the interstate commerce provisions of the Federal Constitution nor does it conflict with the Constitution of the State of New York as an unreasonable interference with private rights and property. People v. Bishopp, 12.

2. *Local bill amendatory of a prior act — What matters constitute limitations of the extent to which the body of the amending act may amend the prior statute — The subject must be expressed in the title — When water bonds violate the Constitution, art. VIII,* § 10.— Where a local bill — the primary purpose of which as stated first in its title, is to amend a prior act relative to the government of a city, create a municipal improvement commission and define its duties and power — states, in the second and third portions of its title, matters germane to the said primary purpose, the amendment of the prior act, these matters constitute specifications of the particulars in which the prior act is proposed to be amended, and limit the extent to which the body of the amending act may amend the prior statute. Where, in addition to the matters thus specifically set forth in the title of the amending act, its body contains a provision changing the personnel of the commission — a purpose nowhere set forth in the title of the amending act — so much of it as makes this change is void because it violates the constitutional requirement, article III, section 16, that the subject of a local bill must be expressed in its title. Where the act authorizes the city to issue, for a proposed increased city water supply, bonds, running more than twenty years, which, taken with outstanding city and water bonds, will exceed ten per cent. of the assessed valuation of the city, and the act does not require the city to establish a sinking fund to redeem these water bonds at maturity, so much of the act as authorizes this issue is void as violative of section 10 of article VIII of the State Constitution. Cahill v. Hogan, 360.

See Civil Service.

CONTRACT.
Between street surface railroads — When a lessor corporation cannot, in view of the rights of the public to travel, arbitrarily decide, and use physical force and obstructions upon its tracks to enforce its decision, that cars run over its tracks by a lessee corporation are somewhat longer and heavier than the agreed length and weight.— A contract made between street surface railroads, having special reference to their duties to the public and in the use of public franchises, must not be construed so as to defeat the purpose for which it was intended but so as to accomplish the public purpose it was designed to subserve. Where a controversy arises between a surface railroad company operating in Albany and a similar railroad company operating between Schenectady and that city under a written agreement made between them securing, for value, to the latter road the right to run its cars over the tracks of the former in Albany and providing that the latter should not operate

Digitized by Google

CONTRACT — Continued.
cars of such excessive size or run them at such excessive speed as to endanger the property of the former and that until the parties agree upon another type of car the latter may operate cars forty-eight feet over all and not exceeding in weight twenty-five tons when loaded, as to whether certain cars run over the Albany tracks by the latter are to any extent a violation of the above covenant and limitation, and it appears that the cars presently objected to by the Albany railroad have run for some time without resultant accident or injury, the Albany railroad cannot, in view of the right of the public to travel over the Schenectady railroad and over the tracks of the Albany railroad and of the relative insignificance of the matters in dispute, be permitted arbitrarily to decide the question and to that end obstruct its own tracks and use physical force to prevent the Schenectady railroad from running those cars over them, and the Albany railroad will be restrained from further interference of such character, and if entitled to relief should seek it in the courts. Schenectady R. Co. v. United Traction Co., 282.

See Arbitration and Award; Statute of Frauds.

CONVERSION.
Action against a bank by the plaintiff for the value of checks, payable to his order, deposited with and collected by the bank for a customer of its own after he had cashed them for the clerk of the plaintiff on an endorsement of the plaintiff's name, which the clerk had forged — Express and implied authority of the clerk to endorse — Estoppel.— Proof that a merchant, named Joseph Rosenberg, permitted his clerk, named Hecht, who kept the books, made out bills, collected debts, wrote letters, made deposits in the bank, and signed letters in Rosenberg's name, adding his own initial "H", permitted Hecht to use, for depositing in Rosenberg's bank checks payable to his order, a rubber stamp reading "Pay to the Northern National Bank Joseph Rosenberg", that, so far as appeared, Hecht never, to Rosenberg's knowledge, signed or endorsed Rosenberg's name on a check for transfer to his bank except by the rubber stamp, and that Rosenberg knew that Hecht had had Rosenberg's own checks and customers' checks to his order cashed at a saloon nearby, affords Hecht no express or implied authority to forge Rosenberg's name on the back of customers' checks to his order, and where Hecht does this, afterwards cashes the checks at the saloon, keeps the proceeds and the saloon keeper endorses and deposits the checks in his own bank and it collects them for him, there is no estoppel which prevents Rosenberg from recovering their value of that bank, in an action for conversion. Rosenberg v. Germania Bank, 233.

CONVICTS.
Right to commutation for good behavior — It is a substantial right — Chapter 137 of the Laws of 1903, limiting the right to the case of a definite sentence, does not apply to crimes committed before its enactment — Otherwise it would be ex post facto.— Chapter 137 of the Laws of 1903, which took effect April 6, 1903, providing that commutation for good behavior may be earned only in case the convict is confined upon a definite sentence, does not apply to a case where a convict was sentenced April 17, 1903, to pay a fine and to serve a term of not less than one year nor more than one year and nine months in a State prison for an offence committed prior to the passage of the act of 1903. A statute, which deprives a person accused of a crime of any substantial right which he possessed when the offence was committed, or, which, after that time, changes the punishment of his offence, is as to him *ex post facto* and invalid. The right of a prisoner to earn a diminution of his term by good conduct is a substantial one of which he cannot be deprived by a law passed subsequent to the commission of the offence. People ex rel. Adams v. Johnson, 550.

Digitized by Google

CORPORATIONS.

1. *Action by a judgment creditor, on behalf of a receiver appointed in sequestration proceedings, to set aside an illegal transfer made by the corporation — Status and power of such a receiver — When a transfer is not a reinsurance and is an illegal act terminating the life of the corporation — Disposition of a trust fund of* $100,000 *in bonds deposited with the state superintendent of insurance in accordance with law.*— A receiver, of a trust and life insurance company organized under article II of the Insurance Law, appointed in sequestration proceedings instituted under Code Civ. Pro., § 1784, represents the stockholders, policy holders and creditors of the corporation, is vested with title to all its property and choses in action and may maintain an action to set aside an illegal transfer of all its property made by it or its officers. A transfer made by the corporation of all its assets, which constitute a trust fund for the payment of its debts and upon which creditors have a lien against stockholders and all transferees except *bona fide* purchasers, including $100,000 in bonds deposited by it under section 71 of the Insurance Law with the state superintendent of insurance as a condition of its being permitted to do business, to a transferee upon its agreement to assume liability on all outstanding policies, pay all death losses reported, as per schedule attached to the contract, and certain named commissions to agents as well as rents named, is, where the transferee must be deemed to have known that the transfer would make the corporation unable to pay its debts and terminate its existence by depriving it of all means of carrying into effect the object of its existence, and where the transfer is made against the will of a considerable number of stockholders and leaves a certain number of creditors unprotected, not such a reinsurance as is contemplated by section 22 of the Insurance Law but is as to creditors an illegal transaction which must be set aside. A judgment creditor of the corporation, with execution returned unsatisfied, suing in his own name but in effect for the receiver as well as for all creditors and stockholders who may elect to come into the action, may maintain an action to set aside the transfer, but cannot therein restrain the state superintendent of insurance from transferring the $100,000 in bonds, and the income thereof, to the fraudulent transferee, nor can the superintendent be directed to pay the bonds and income over to the receiver, and this because distribution of that fund, which is a trust fund on which the policy holders have a first lien, must be made either by the superintendent himself or by the court, where it has obtained jurisdiction over him. Raymond v. Security Trust & Ins. Co., 31.

2. *Action by a stockholder to compel a director to account for his dealings in its stocks, etc.— A demand upon, and refusal of, the directors, that they sue must be alleged — The fact that a director elects does not show that he controls the board.*— A stockholder of a corporation cannot maintain an action on behalf of himself and of all other stockholders of the corporation to compel a director of the corporation to render an accounting with respect to all his dealings in relation to the stocks, funds, property and assets of the corporation, where he does not allege and prove a demand upon and a refusal by the directors of the corporation to bring the action, or that a majority of the directors of the corporation are themselves guilty of such fraud and misconduct as would make such a demand unavailing. It does not follow that the defendant director controls the conduct of the board of directors, even though such board was elected through his controlling vote. Bowne v. Smith, 575.

3. *Right of one who as trustee and proxy of a majority of the stockholders votes that stock be issued to himself — Property of the corporation acquired by such means by him will be adjudged to belong*

Digitized by Google

CORPORATIONS — Continued.
to it.— The American Gold and Platinum Mines Company and the Consolidated Gold and Copper Mines Company consolidated and formed the United Gold and Platinum Mines Company. At the time of the merger, one Smith held a majority of the capital stock of each of the constituent companies as general trustee for all the stockholders and he voted this stock, together with other stock owned by him individually, and stock belonging to persons from whom he had proxies, in favor of the consolidation. At the meeting of the stockholders of the American Company, at which the merger was approved, a resolution was passed reciting the rendition by Smith of certain valuable services to the company and of the fact that the corporation was indebted to him in the sum of $25,000 for money advanced and directing the issuance to Smith, out of the stock set aside for treasury purposes, of $1,300,000 in stock. The stock called for by the resolution was not issued to Smith by the American Company, but, after the organization of The United Gold and Platinum Mines Company, 130,000 shares of its stock was issued to him as the equivalent for the stock of the American Company to which he claimed to be entitled by virtue of the above resolution. Such resolution could not have been passed without Smith's vote. The meeting at which the resolution was passed was a special meeting and the notice thereof stated that it was "for the purpose of considering a plan of amalgamating the interests of properties of this company (the American Company) with that of the Consolidated Gold and Copper Mines Company, and for such other business in relation thereto, as well as the general business of the company, as may be presented to the meeting." In an action brought by the United Gold and Platinum Mines Company against Smith to compel the latter to return the stock in question to its treasurer, it was *held*, that the resolution of the American Company directing the issuance of the stock to Smith could not be sustained, for the reasons, first, that it was passed for the personal benefit and advantage of the defendant, by the controlling vote of the defendant himself, while he was a director and an officer of the company and trustee and proxy for nearly all the stockholders; second, that the notice of the meeting was not sufficient to give the stockholders any intimation that such a resolution as the one in question would come before the meeting, and third, that the issue of the stock to Smith was not authorized by any provision of the merger agreement and was not ratified at any subsequent meeting of the stockholders of either of the constituent companies or of the plaintiff. At a meeting of the directors of the American Company held June 16, 1902, subsequent to the approval of the merger agreement, a resolution was adopted authorizing the issuing, for the purpose of meeting the daily financial obligations of the company, of twenty $1,000 notes of the company, each note to carry as a bonus 500 shares of the company's stock. On January 3, 1903, after twelve of these notes had been negotiated and while eight of them were still in the possession of the American Company, the executive committee of the plaintiff passed a resolution authorizing the substitution of its notes in renewal of or in place of the twenty notes of the American Company which had then matured and also attaching an additional bonus of 500 shares of stock to each of the notes, making the total bonus with each note 1,000 shares of the plaintiff's stock. September 13, 1902, the board of directors of the plaintiff passed a resolution reciting an indebtedness due to Smith from the American Company and from the consolidated company and providing "That notes of $1,000 each, dated the twenty-sixth day of June, and payable six months after date, shall be made payable to the order of Charles E. W. Smith to cover said indebtedness, each note to be accompanied by a certificate of 500 shares of the preferred stock of the United Gold and Platinum Mines Company. * * * said notes to be similar to the notes heretofore issued by the A. G. & P. M. Co." The notes of the plaintiff called for by the latter

Digitized by Google

CORPORATIONS — Continued.
resolution were not issued to Smith, but it appeared that he took over to himself eight of the original notes of the American Company. *Held*, that the plaintiff was the owner of such eight notes and of the renewals thereof and of the shares of stock of the plaintiff attached thereto as a bonus; that said original notes were issued for the purpose of raising money to meet the financial obligations of the American Company, and not for the purpose of paying an indebtedness due to Smith; that the resolution adopted by the directors of the plaintiff on September 13, 1902, related to notes of the plaintiff and did not entitle Smith to any of the original notes issued by the American Company or to the renewals thereof. United Gold & Platinum Mines Co. v. Smith, 567.

See **Associations; Discovery; Pleading; Will.**

1. *Continuity of the original action not affected by a second new trial awarded under Code Civ. Pro.*, § 1525.— In an action of ejectment, it appeared that on the first trial a judgment entered on a verdict directed for the plaintiffs was reversed by the Appellate Division with costs to the defendants to abide "the event", that a judgment entered on a verdict directed for the plaintiffs on the second trial was affirmed by the Appellate Division and that on a third trial, obtained by the defendants under Code Civ. Pro., § 1525, a verdict was directed in their favor upon which they entered judgment. Upon a motion for retaxation of costs. Held, that the identity and continuity of the original action were not affected or broken by the order for a second new trial made under Code Civ. Pro., § 1525, that "the event" contemplated by the order of the Appellate Division — the final result of the action in which the costs were awarded — had been in favor of the defendants and that the clerk was therefore correct in taxing in their favor the costs and disbursements of the first appeal. Barson v. Mulligan, 26.

2. *When a trial occupied more than two days.*— On May 23rd, the attorney for the plaintiff in an action examined and accepted the jury and the attorney for the defendant while examining them on that day stated to the justice presiding that the counsel who was to try the action desired an adjournment until the next day. Thereupon the justice stated in court that the case was to be considered on trial in that part of the court and it appeared in the New York Law Journal of May 24th as on trial in that part of the court on the previous day and as "unfinished." The case was tried on May 24th and 25th. *Held*, that the clerk was correct in taxing for the successful party an item of ten dollars costs for a trial occupying more than two days. Goodkind v. Metropolitan St. R. Co., 30.

3. *Persons, who sue in a representative capacity only and whose lack of capacity is adjudged in the suit, will be charged with costs personally.*— Where persons sue in a representative capacity, as administratrix and administrator with the will annexed of a testatrix, and their capacity is denied and it is adjudged in the action that their appointment was void and consequently that they are without the representative capacity which they allege, they must be charged with costs personally. Baldwin v. Rice, 74.

See **Ejectment; Marriage; Sheriffs.**

COUNTERCLAIM.
See **Pleading; Rules.**

COUNTY CLERKS.
See **Civil Service.**

Digitized by Google

COUNTY COURTS.

Of Kings county — Jurisdiction of an action to recover of a non-resident of the county a sum of money only, removed by the defendant to the County Court from a Municipal Court of the city of New York.— The County Court of Kings county has jurisdiction of an action brought in the Municipal Court of the city of New York in the borough of Brooklyn against a non-resident of Kings county to recover a sum of money only and removed by the defendant under the Municipal Court Act to the County Court — in a case, where the Municipal Court had jurisdiction of the subject matter and of the defendant — not because the removal estops the defendant from raising the question of the jurisdiction of the County Court in such a case, but because Code Civ. Pro., § 2934, as amended in 1893, had the effect of giving the County Court of Kings county jurisdiction over actions removed to it from district and justices' courts — of which the Municipal Courts are a continuance and have jurisdiction in cases where district and justices' courts had formerly had it — even if the action was for a sum of money only and the defendant a non-resident of the county, and this jurisdiction was expressly preserved to the County Court of Kings county by section 14 of article VI of the State Constitution providing that "County Courts shall have the powers and jurisdiction they now possess". Raynes v. Bloom, 81.

COUNTY TREASURER.

See **Taxes.**

COURTS.

See **Injunction.**

COURTS OF SPECIAL SESSIONS.

A formal written information of a misdemeanor not required in the New York Special Sessions — What the return of the magistrate must contain — The depositions need not be reduced to writing — Demurrer on the ground that an affidavit stating the offense is disjunctive — A formal complaint is necessary outside of New York city.— Where a person arrested, with or without a warrant, is held by a magistrate of the city of New York for trial at the Court of Special Sessions in that city upon a charge of misdemeanor, it is not necessary that a formal written information or any other pleading in the nature of an indictment shall be filed or returned to the Court of Special Sessions. In such a case, it is only necessary for the magistrate to return to the Court of Special Sessions in the city of New York, "the warrant, if any, the depositions, the statement of the defendant, if he has made one, and all undertakings of bail, or for the appearance of witnesses taken by him," and even this duty is qualified by subdivision 6 of section 204 of the Code of Criminal Procedure, which, in the county of New York, exempts the magistrate from reducing to writing depositions taken by him, unless the defendant, or the district attorney, shall so elect. Consequently, where the only document in the nature of a deposition or of an information returned to the Court of Special Sessions in such a case is an affidavit stating that the charge against the defendant is that he "did unlawfully and willfully sell or give away one package of cigars known as 'Jack Rose Little Cigars' to one Edward Gluck, a male child actually and apparently under the age of sixteen years, to wit, of the age of eleven years, in violation of section 290 of the Penal Code of the State of New York," a demurrer will not lie to such affidavit because of its disjunctive averments. *Semble*, that in Courts of Special Sessions outside of the city of New York there must be a formal complaint in the nature of a pleading before the defendant can be required to plead. People v. Zabor, 633.

Digitized by Google

CREDITOR.
See Lien Law.

CREDITOR'S ACTION.
See Partition.

CRIMINAL LAW.
1. *Code Crim. Pro.*, § 773 — *When a coroner is justified in committing a person upon the ground of probable cause to believe that a homicide has been committed and that the person is chargeable with it — Issue of warrant when unnecessary.*— An affidavit of a police officer, presented to a coroner upon an inquisition had by him in regard to the matter, stating that the officer found an unconscious man, dying from a pistol shot wound, with a revolver in his right hand pocket, lying in a hansom cab across the lap of a woman — whom, as appeared, the officer thereupon took into custody without a warrant — that the man died and that the officer was present at the autopsy, affords probable cause, within the meaning of Code Crim. Pro., § 773, to believe that a homicide has been committed and that the woman is chargeable with it and justifies the coroner in committing the woman in order to keep her in custody during the period of preliminary investigation. The woman being in custody, there is no necessity for the coroner to issue a warrant. People ex rel. Patterson v. Flynn, 20.

2. *Sufficiency of an indictment for a conspiracy to defraud — Description of crime — Some additional overt act must be done and pleaded in furtherance of the object of the conspiracy — When an indictment does not charge more than one crime — Where the overt act, necessarily alleged, is not sufficiently alleged to charge a felony, the misdemeanor of conspiracy does not merge in the felony.*— Conspiracy is an offense known to the common law and where an indictment specifically charges that crime the indictment is not demurrable under Code Crim. Pro., § 276, requiring an indictment to name the crime. An indictment which alleges that the defendants, individually and as officers of both the companies hereinafter named, conspired to cheat and defraud the Rathbun-Sawyer Co., by drawing drafts and checks against it in their favor or in favor of some or all or each of them, and in favor of the Gulf Milling Co. representing indebtedness due from the said Rathbun-Sawyer Co., and procured the checks and drafts to be cashed, when, as the defendants knew, no such indebtedness existed and that thereby the Rathbun-Sawyer Co. was defrauded of $20,000, which the defendants appropriated to their own use or to the use of persons to the jury unknown, other than the true owners thereof, is sufficient, as the unlawful agreement is alleged as well as the doing of an overt act in furtherance of, and to carry out, the agreement. The indictment need not set out the checks and drafts. It does not charge more than one crime merely because, after stating the crime, it alleges the acts done to effectuate the object of the conspiracy. As the People are required by law to establish, not only the conspiracy, but also to charge and prove the commission, by one or more of the conspirators, of some overt act to effect the object of the conspiracy, the allegation, in the indictment, of the overt act that the defendants appropriated $20,000 — not sufficiently alleged in the indictment, as appears therefrom, to set forth the felony of grand larceny and procure a conviction for that crime — cannot be permitted to effect a merger of the conspiracy in the felony and thereby prevent a prosecution for the conspiracy. People v. Rathbun, 88.

3. *New York city — Summary jurisdiction of city magistrate under the Public Charities Law.*— A city magistrate of the city of New York has no jurisdiction summarily to try and convict a woman between the ages of fifteen and thirty years, sentencing her to three years' imprisonment in the State reformatory. The Public Charities Law creates no new crime nor does it extend the jurisdiction of city magistrates. The

Digitized by Google

CRIMINAL LAW — Continued.
definition of the offense of being a common prostitute, and its punishment, must be found in the Penal Code and in the Code of Criminal Procedure or in the provisions of the charter of the city of New York, and there is no warrant for the imposition of three years' imprisonment on summary conviction before a magistrate. People ex rel. Stein v. Keeper of State Reformatory, 122.

4. *New York city — Disorderly conduct tending to a breach of the peace, under the Consolidation Act of* 1882, § 1458, *which is still in force in that city — Office of the writs of certiorari and habeas corpus — Prostitute — Punishment — Essentials of the magistrate's jurisdiction.* — Neither a writ of *habeas corpus* nor one of *certiorari*, upon a commitment in the nature of a final judgment, acts as a writ of review or of appeal and under neither writ is the evidence to be reviewed or errors committed on the trial corrected. The remedy to accomplish such a result is by appeal. The Supreme Court is confined, upon these writs, to a consideration of the question whether the magistrate had jurisdiction of the offense, of the person and to pronounce the judgment imposed. Sections 1458 and 1461 of the Consolidation Act of 1882 are still in force in the city of New York, and under the second subdivision of section 1458 declaring guilty of disorderly conduct that tends to a breach of the peace every common prostitute or night walker loitering or being in any thoroughfare or public place for the purpose of prostitution or solicitation to the annoyance of the inhabitants or passersby, a police magistrate of said city has jurisdiction summarily to convict the offender, and, under sections 707 and 711 of the revised charter of the city of New York (L. 1901, ch. 466), compel her forthwith to give surety for her good behavior and, upon her failure to do so, commit her to the city prison, for transfer to or detention in the workhouse, for a period not longer than six months. All that is essential to the jurisdiction of the magistrate is that the offender be arraigned before him, be apprised of the nature of the offense, with which she is charged and for which she is to be tried, be offered an opportunity to defend and be then duly tried on that charge. People ex rel. Reynolds v. Warden of City Prison, 149.

5. *Insufficiency of a complaint on information and belief for the issue by a magistrate of a warrant and for his holding an examination.* — A complaint on information and belief is insufficient to confer jurisdiction upon a magistrate to issue a warrant of arrest or hold an examination of the charge. People ex rel. Levy v. Preston, 267.

6. *Indictment found on illegal and insufficient evidence set aside.* — The provisions of the Code of Criminal Procedure, § 313, stating the reasons for which an indictment must be set aside, are not exclusive, and, in view of section 256 of said Code declaring that the grand jury can receive none but legal evidence, a county court may, by virtue of its inherent right and duty to protect the citizen in his constitutional prerogatives, set aside an indictment where it appears that it was found on illegal or insufficient evidence. People v. Bills, 348.

7. *When the admission of erroneous evidence is not fatal error.* — The admission, upon the part of the People upon a trial for murder in the first degree, of clearly illegal evidence will not justify issue of a certificate of reasonable doubt whether a conviction of murder in the second degree should stand where on all the evidence the guilt of the accused is clear and during the trial and on the day after the illegal testimony was admitted by the trial judge he struck it out and instructed the jury to disregard it — it should be assumed that they did as instructed. People v. Smith, 379.

See City of New York; Courts of Special Sessions; Police; Sunday.

Digitized by Google

DEEDS.

1. *Consideration.*— A deed, delivered in escrow to the grantor's agent, to be delivered by him to the grantee if the grantor got drunk again, is void for lack of a consideration both for the delivery and for the deed. Bosea v. Lent, 437.

2. *What constitutes delivery.*— To constitute delivery of a deed there must be something more than a physical change of possession. There must be an intention to part with the title also "involving acceptance." Commins v. Perry, 456.

See **Taxes.**

DEFAULT.

See **Judgment.**

DEMURRER.

See **Courts of Special Sessions; Pleading.**

DEPOSITIONS.

See **Courts of Special Sessions.**

DEVISE.

See **Will.**

DISCOVERY.

Inspection of the books of a foreign corporation — The New York courts cannot compel it — The remedy is in the State in which the corporation was formed — Effect of the books being out of such State.— The courts of the State of New York have not jurisdiction to grant, upon an application by a stockholder of a foreign corporation, a writ of mandamus to compel an inspection by him of the books and records of such corporation. Such inspection is enforcible only by the courts of the State in which the corporation has its legal existence, and if the books are not within that State the corporation may be compelled to bring them therein. Matter of Mitchell, 514.

DIVORCE.

Action for — What must be shown in support of a confession made by the guilty party — Proof required of defendant's default outside of an entry thereof in the register of the plaintiff's attorney.— To justify the court in awarding a judgment of absolute divorce upon the confession of the party charged with adultery, the circumstances attending such confession must be shown to be of a character that precludes all suspicion of collusion and as a general rule such confession should be corroborated by other proof. In such a case, a witness sworn to establish that the defendant made default in pleading should be shown to have more definite knowledge of the default than that derived from a mere inspection of the register of the plaintiff's former attorney of record. Diederichs v. Diederichs, 591.

DOMICILE.

See **Veterans.**

DOWER.

See **Will.**

EASEMENT.

License or permission cannot give an adverse right — Rights above the surface of a street.— An adverse right of easement cannot grow out of a mere license or permissive enjoyment. The public occupy the surface of a street and to its use as a street the rights of abutting lots are subservient, but, above the surface, there can be no lawful obstruction to the access of light and air to the injury of an adjoining owner.

Digitized by Google

EASEMENT — Continued.
The existence of such an obstruction — without his consent — gives him a right of action against the individual obstructing. Slattery v. McCaw, 426.

See Railroads.

EJECTMENT.
See Costs.

ELECTION.
To proceed on contract is final — What is an.— A statement made by the plaintiff in an affidavit submitted by him in opposition to a motion for a change of venue, that the action is in tort, does not constitute a binding election, where it appears that the statement in question was merely incidental and that it apparently had no effect upon the decision of the court which was adverse to the plaintiff. If, however, the plaintiff succeeds in obtaining a reference of the issues arising in the action, on the faith of his formal declaration that the action is upon contract and not in tort, he will be held to have made an election which will be binding upon him in all future proceedings in the action. Price v. Parker, 582.

See Pleading.

ELECTIONS.
Inspectors of.— In determining what ballots shall be counted for or against any candidate — or wholly rejected — as well as any question voted on, inspectors of election act judicially and cannot be required by a common-law mandamus to decide in a particular manner. People ex rel. Haverly v. Hanes, 475.

See Liquor Tax Law; Veterans.

ELEVATED RAILROADS.
See Railroads.

EQUITY.
See Pleading.

ESTOPPEL.
See Conversion.

EVICTION.
On a lease, for rent — Necessary to a breach of a covenant of quiet enjoyment — When a defense to rent — A tort is not a proper counterclaim in such an action.— To constitute a breach of a covenant of quiet enjoyment, contained in a lease, there must be an actual eviction, or a constructive eviction and the latter cannot be deemed to have occurred unless there has been a surrender. To constitute a defense to an action for rent the eviction must take place before the rent becomes due. Allegations of an answer, interposed by a tenant to a complaint for rent, that because it was due and unpaid the landlord threatened him and prevented him from removing his property from the demised premises, sound in tort and damages therefor cannot be counterclaimed by the tenant in this action. George A. Fuller Co. v. Manhattan Construction Co., 219.

EVIDENCE.
Definition of impeaching.— Evidence impeaches a witness when it assails his general credibility or otherwise weakens the force of his testimony and detracts from the weight to be given to it, without having of itself probative value as original evidence upon the matter at issue. Hagen v. N. Y. C. & H. R. R. R. Co., 540.

See Criminal Law; Divorce; Gift; Husband and Wife; Judgment; New Trial; Surrogate's Court; Trial; Witness.

Digitized by Google

EXCISE.
See Liquor Tax Law.

EXECUTION.
See Judgment; Lien Law.

EXECUTORS AND ADMINISTRATORS.
1. *Debt due his testator at his death — Punishment for disobedience of a decree.*— It is the duty of an executor, indebted to his testator when he died, if solvent at any time before his final accounting, to pay, as an individual, the debt to himself as executor. Where a decree has charged him with the debt his failure to comply with the decree is punishable with fine and imprisonment and these the surrogate may inflict. Matter of David, 337.

2. *Savings bank accounts — An account "James Finn in trust for Mary Finn" belongs to Mary Finn — An account "James Finn or Mary Finn" — What proof establishes title in Mary Finn.*— Mary Finn, whose name prior to her marriage to James Finn was Mary Myers, was on his death appointed administratrix of his estate, and thereafter withdrew moneys from savings bank accounts standing in the following names: "James Finn, in trust for Mary Finn, his wife;" "James Finn, in trust for Mary Finn," and "James Finn or Mary Finn," the latter account consisting of moneys transferred from an account which had formerly stood in the name of "James Finn, in trust for Mary Myers." *Held* that the money so withdrawn did not belong to the decedent, and that the widow could not, as administratrix, be charged therewith. Matter of Finn, 622.

See Accounting; Costs; Surrogate's Court; Will.

FIRE.
See Negligence.

FIRST JUDICIAL DEPARTMENT.
See Calendar.

FIXTURES.
See Foreclosure.

FORECLOSURE.
What are fixtures, as between the mortgagee and conditional vendors thereof, where they have been placed on the premises at the instance of the mortgagor after he had mortgaged the premises.— Gas fixtures placed on real estate are personalty as not essential to the use for which the real estate is appropriated, and, when placed on mortgaged premises at the request of the mortgagor, the mortgagee can assert no lien or priority in regard to them as against the vendor in an action brought by the mortgagee to foreclose the mortgage. A steam-heating plant and hot-water generating plant placed on the mortgaged premises under a written agreement, made between the mortgagor and vendor alone and duly filed in the office of the register of the city of New York, providing that all materials placed in the building should remain the property of the vendor until full payment, has the effect of preserving to the things sold their character as personalty, and the mortgagee has no lien on them. Conditional vendors, such as are above described, holding claims, which must be deemed collateral, claiming priority over the mortgage and absolute ownership of the personalty placed by them on the premises, are neither proper nor necessary parties to the mortgagee's action of foreclosure and as to them the complaint must be dismissed. Condit v. Goodwin, 312.

See Surplus Moneys.

Digitized by Google

FRAUDULENT CONVEYANCES.

1. *Writ of assistance — Discretionary — Not issued to perform something the judgment did not require to be done.* — An interlocutory judgment, recovered in an equitable action brought by the committee of an incompetent person to set aside as fraudulent a conveyance of a farm made by the incompetent person to the defendant, merely setting the conveyance aside and requiring the defendant to account before a referee for his use of the farm and expenses incurred, does not authorize issue of the discretionary writ of assistance to remove from the farm the occupant, he claiming possession under an agreement with the defendant to work the farm on shares, where he had, before a *lis pendens* was filed in the action, received the key of the dwelling house on the farm, removed chattels to the dwelling house, performed considerable work preparatory to the next season's crop, and on the day the *lis pendens* was filed had moved into the dwelling house. Baird v. Van Vechten, 279.

2. *Action to set aside — When the complaint therein does not also set forth a cause of action on contract — Such a joinder would be improper — When it will not be amended to conform to the proof — Prayer for relief considered in determining the character of the action — Motion for nonsuit — Questions arising thereon where decision is reserved until after verdict.* — The complaint in an action brought by a judgment creditor after the return of an execution unsatisfied, set forth alleged fraudulent conveyances of the judgment debtor's real and personal property and further alleged that the grantee, in consideration of such conveyances, had agreed to pay the indebtedness of the judgment debtor to the plaintiff. Judgment was demanded that the conveyances be set aside as fraudulent, that the real estate included in the conveyances be declared subject to the lien of the plaintiff's judgment, that the proceeds of certain real property which was included in the conveyances and which had been sold by the grantee be applied to the payment of the plaintiff's judgment and that a receiver of the judgment debtor's property be appointed. The notice of *lis pendens* stated that the action was "in the nature of a creditor's bill to set aside and declare null and void as in fraud of creditors, and to establish a lien, upon certain premises," and in opening the case, the counsel for the plaintiff characterized the transactions as fraudulent and as intended to hinder and defraud creditors. *Held* that the only cause of action alleged in the complaint was one to set aside the alleged fraudulent conveyances. That the allegations concerning the grantee's agreement to pay the debts of the judgment debtor were simply allegations of steps in or parts of the alleged fraudulent scheme, and did not constitute a separate cause of action on contract. That the two causes of action in question could not properly be united in the same complaint. That as the evidence offered by the plaintiff to prove a cause of action on contract had been received over the objection of the defendant, the plaintiff was not entitled to have the complaint amended to conform to the proof. That as such an amendment would change the cause of action from tort to contract the court would have no power to grant it. While ordinarily, a demand for relief is not conclusive as to the character of the action, yet where a complaint sets forth facts that may support equally an action at law or in equity, the character of the action is determined by the relief demanded. Zeiser v. Cohn, 462.

See **Judgment.**

GAMING.

The right of a loser to recover, as for money had and received, money lost on a bet, is given by 1 *R. S., m. p.* 662, §§ 8 *and* 9, *still survives, and has not been affected by section* 17 *of the Percy-Gray Racing Law of* 1895. — The provisions of the so-called Percy-Gray Racing Law (L. 1895, ch. 570, § 17) imposing upon a person, making a bet or wager on race courses subject to that act, liability to a civil action by the

Digitized by Google

GAMING — Continued.
person betting with him for the amount of the bet — which liability is therein expressly denominated a penalty and exclusive of all other penalties prescribed by law for the acts specified in the section — did not impliedly repeal sections 8 and 9, 1 R. S., m. p. 662, declaring unlawful all wagers, etc., depending on any race, and giving the loser, etc., of any money, etc., placed on any wager or bet therein prohibited, an action to recover of the owner, etc., the money paid, etc., whether or not the wager was lost. The remedy of the Revised Statutes still survives and is maintainable in the form of an action for money had and received. The action is in its nature remedial and not penal and therefore need not be brought in the county where the cause of action arose, as would be the case under Code Civ. Pro., § 983, were the action one to recover a statutory penalty. Where the bet is made on a race course not subject to the Percy-Gray Law, section 17 of that law can afford the defendant no defense upon the ground of an implied repeal effected thereby of the remedy under the Revised Statutes. Mendoza v. Rose, 241.

GIFT.

1. *Ineffectual unless absolute — Delivery — Intent of donor that the donee should have the thing given, when ineffectual — When a joint tenancy, with right of survivorship, is not created.* — A mother having a deposit in a savings bank, whose rules forbid payment except on presentation of the pass-book, and who had made a will giving her daughter all her bank deposits, not exceeding $7,000, went with her daughter to one of the banks, a savings bank, told an officer thereof that she would like her account there arranged so that either she or her daughter could draw it and, if anything happened to herself her daughter could get the money without any further trouble. The officer advised the making out of a new book in the name of herself or her daughter or the survivor of them, and this was done. Later when her deposits had come to exceed $7,000, the mother by a codicil to her will revoked its gift to her daughter of the bank deposits and substituted therefor $7,000 in money. She retained the pass-book during her life and after her death her executors claimed this savings bank deposit as assets of her estate. There was no question but that the mother had intended her daughter to have this deposit after her own death. Held, that there was no absolute gift of the deposit as there was no irrevocable renunciation by the mother of all her interest in or title to the deposit, she having retained until her death the pass-book, without which the deposit could not be drawn, and being able at all times to draw it without the aid, assistance or permission of her daughter. That the intention of the mother that after her death her daughter should have the deposit did not entitle the latter to recover it, because as a testamentary disposition of property the same was invalid, and if the gift regarded the future it was invalid as a promise without consideration. That there was no creation of a joint tenancy, with right of survivorship in the daughter, as the mother had at all times during her life retained control of the deposit, with opportunity to repent and change her purpose as to its disposition, and of this right she availed herself when she executed the codicil to her will nullifying its disposition of the bank deposits. Kelly v. Home Savings Bank, 102.

2. *Ineffectual where the donor at all times retains control of the thing given.* — Proof that a depositor in a savings bank, whose rules forbid payment except on presentation of the pass-book, went to the bank and asked the teller to add the name of her niece to the pass-book so that either or the survivor of either could draw the moneys, that the depositor then signed a printed form, which he presented to her, requesting the bank to add the name of her niece "as owner and creditor with me" (these quoted words being printed) of all moneys and interest thereon deposited or to be deposited in her account "with full authority

Digitized by Google

GIFT — Continued.
for each, or either of us, or the survivor of us to draw from the said bank the whole or any part of such moneys or such interest," and that the bank account was changed so as to read "Pay to either or the survivor of either" of the said persons, does not show a complete gift of the deposit to the niece, since the depositor, shown at all times during her life to have retained possession of the pass-book, thereby retained control over the money and prevented her niece from drawing any of it except in so far as she permitted the niece to draw some of it by giving her from time to time possession of the pass-book for that purpose. Hallenbeck v. Hallenbeck, 109.

GUARANTY.
"Payment on delivery."— A guaranty of payment by the vendee of the price of castings to be manufactured by the vendor "as per contract," deliverable in fifty lots on fifty consecutive days, is only a guaranty of the price of castings actually delivered, and, for a breach of the contract, consisting in the vendee's refusal to accept castings manufactured and shipped to him, the vendor cannot recover under the guaranty. In view of the vendee's right to ascertain by inspection before acceptance whether the castings tendered correspond with those agreed to be manufactured, the covenant of "payment on delivery" is not violated by a stipulation, made between the parties to the contract after it and the guaranty had been executed, that the castings should be shipped to the vendee with the bill, that he should check them off, and then send a check for them to the vendee. McAfee v. Wyckoff, 380.

GUARDIANS.
See **Infants.**

HIGHWAYS.
1. *Construction of sections* 84, 85, 92 — *Application for commissioners to lay out a highway — Oath required of them — Proceeding avoided by their failure to take it — Town not chargeable with costs to a land owner where the proceeding fails — Notice to town highway commissioner of the commissioners' meeting.*— The requirement of section 84 of the Highway Law that commissioners, appointed by a County Court to determine upon the necessity of a highway proposed to be laid out in a town and assess the damages by reason of the laying out, shall "take the constitutional oath of office" means the oath prescribed in section 1 of article XIII of the Constitution of the State of New York requiring, among other things, an oath or affirmation to support the Federal and State Constitutions, and this requirement is mandatory. Where it is not embodied in the oath taken, the proceeding is void, and the objection may be taken by the town commissioner of highways on a motion made to confirm the decision of the County Court commissioners. The provision of section 92 of the Highway Law that in all cases of assessment of damages by commissioners appointed by the court the costs shall be paid by the town applies only where the proposed improvement is carried into effect, and where the proceeding is declared void an owner who had obtained damages from the commissioners for land proposed to be taken cannot recover of the town costs he incurred in the proceeding. The failure of the County Court commissioners to give the town highway commissioner personal notice of the time and place of their meeting — the provision as to which notice is contained in section 85 of the Highway Law — does not invalidate the proceeding where the notices required by that section have been duly posted, as the posted notices are sufficient notice to the town highway commissioner. Matter of David, 192.

2. *Power of town highway commissioner to create a liability — Necessity of audit.*— No statute authorizes a town highway commissioner to

Digitized by Google

HIGHWAYS — Continued.
create a liability, upon the part of his town, to a person he hired to cut brush along a town highway, and even if such a liability were created it would not become actionable until the claim had gone before the town auditors. Wright v. Town of Wilmurt, 456.

See **Bridges.**

HOMICIDE.
See **Criminal Law.**

HUSBAND AND WIFE.
When there is sufficient evidence that she was the undisclosed principal for whom he was acting.— Where a house is being constructed on a lot owned by a woman and her husband tells a materialman that the house is being built for sale and the husband orders materials to be furnished to it but does not say to whom they shall be charged and the woman sees the work in progress and directs alterations, there is sufficient proof of her being the undisclosed principal for whom the husband was acting to charge her for the value of the materials. Whipple v. Webb, 302.

INDICTMENT.
See **Courts of Special Sessions; Criminal Law.**

INFANTS.
Rights not prejudiced by guardian's lack of diligence.— Where the moving party is an infant of tender years it is the duty of the court to protect and guard the rights of such infant, and the failure of the guardian to prepare his ward's case for trial will not be permitted to defeat the substantial rights of the infant. Hagen v. New York Central & Hudson River R. R. Co., 540.

See **New Trial.**

INFORMATION.
See **Courts of Special Sessions.**

INJUNCTION.
1. *Police captain permanently restrained from keeping his officers in a licensed saloon, and in a dining room above it conducted by the saloon proprietor in connection with it, upon his mere suspicion that gambling is being carried on upon the dining room floor.*— A police captain who keeps his officers stationed in a licensed saloon and in a dining room on the floor above conducted by the saloon proprietor in connection with the saloon, upon his mere suspicion or claim that gambling is being carried on in a room on that floor, rented of the saloon proprietor by an incorporated social club, which officers interfere with people coming in, sometimes forbid or prevent them from going up to the dining room floor, prevent butchers, who have leased a dressing room on that floor from entering it — all to the great damage of the proprietor — is guilty of trespass and, at the suit of the proprietor of the saloon, the police captain will be permanently restrained from the further commission of such trespasses on the premises. Hale v. Burns, 1.

2. *Simple contract not negotiable — Railway traffic agreement collateral to mortgage securing bond issue — Innocent purchasers of bonds take subject to equities — Injunction on issue of bonds when unnecessary to keep open the question of the validity of the mortgage.*— On a motion to continue an injunction *pendente lite* obtained by the plaintiffs, stockholders of the Eastern Illinois Co., to restrain the defendant railroad companies from issuing a series of bonds and notes secured by a mortgage covering among other things a traffic agreement made between the

Digitized by Google

INJUNCTION — Continued.
defendants, it appeared that the defendant, the San Francisco Co., had acquired absolute and voting control of the defendant, the Southeastern Co., running between the San Francisco Co. and the Eastern Illinois lines, with earnings not meeting fixed charges and a bonded indebtedness of $15,000,000, that the San Francisco Co. had also acquired absolute and voting control of the defendant, the Eastern Illinois Co., a profitable road, paying six per cent. dividends and accumulating a surplus, by procuring a large amount of its common stock to be deposited with a trustee — which in return issued to depositing stockholders stock trust certificates — under a written agreement made with the trustee by the San Francisco Co. that it would, on or before July 1, 1942, or, at its option, on any earlier dividend day, pay registered holders of the certificates the sum of $250 for each share of stock represented by the certificates and semi-annual dividends at the rate of ten per cent. on the par value of the shares, that thereafter the traffic agreement was executed between the San Francisco Co. and the Eastern Illinois Co., on the one part, and the Southeastern Co. on the other part, whereby the latter bound itself to deliver to the former companies respectively all traffic transported over its lines and destined to any point on theirs, while, on the other hand, the San Francisco Co. and the Eastern Illinois Co. jointly bound themselves collectively to interchange, with the lines of the Southeastern Co., a sufficient amount of traffic, during the term of the agreement, to produce to the Southeastern Co., taken with its local traffic, an aggregate semi-annual net revenue of not less than $485,000, being the precise amount necessary to pay the interest under the refunding scheme proposed. The plaintiffs, the trustee having refused to act, sue in their own names charging the traffic agreement to be in reality a disguised mortgage imposed, without authority or real or adequate consideration, upon their profitable Eastern Illinois property in order to make use of its credit to float the $16,000,000 worth of bonds issued upon the property of the unprofitable Southeastern Co. It further appeared that before issue of the injunction $15,000,000 worth of the bonds had been certified, and that about half of them had been delivered by the trustee to the parties entitled and the other half passed to their credit. Held, that within the rule, which was applicable to the traffic agreement, that the purchaser of a chose in action takes the interest purchased subject to all defenses, legal and equitable, of the debtor who issued the security, innocent purchasers of the bonds would be in no better position to enforce the traffic agreement against the Eastern Illinois Co. than would the Southeastern Co., through whom they would derive their right, that company having included the traffic agreement in the mortgage given to secure the bonds, that, therefore, the claim of the plaintiffs that they would suffer irreparable injury if the bonds passed into the hands of purchasers for value and without notice, was untenable and that the plaintiffs had no right on that ground to the injunction, restraining issue of the bonds, or to its continuance. Kissel v. Chicago & East. Ill. R. R. Co., 156.

3. *Temporary — The right thereto is dependent on the nature of the action and the complaint must state the facts which give the right.*— The right to a temporary injunction depends on the nature of the action and the complaint must state the facts entitling the plaintiffs to the injunction. The defect cannot be supplied by affidavit. A complaint which alleges that the defendant, without the consent of the plaintiffs, landlords of the building demised, caused to be made a cut or opening in the west basement hall and that unless the defendant is restrained from using the cut or opening great and irreparable damage will be sustained by the plaintiffs, does not, without more, state a cause of action, and a temporary injunction theretofore granted the plaintiffs, restraining the defendant from using the cut or opening, should not be continued. Glascoe v. Willard, 166.

Digitized by Google

INJUNCTION — Continued.

4. *Action to follow and impress a trust on a fund alleged to have been acquired by the crime of extortion — When a receiver and an injunction pendente lite are proper.*— Where the complaint and affidavit of the plaintiff, a man over eighty years of age, read on his motion, for an injunction and a receiver, made in an action brought against the defendant, Elias, a woman, as well as against various depositaries of her moneys, to follow and impress a trust on $685,385, he paid her in unequal annual payments from 1896 to 1904, alleges that he made these payments because of her threats that, unless he did so, she would do him bodily harm, expose his admitted illicit relations with her to his family and friends, charge him as father of her illegitimate child, and tell her husband, a man of violent temper, of the illicit relations, and further, that she did, in effect, charge him as such father by causing to be filed with the registrar of vital statistics, of the city where both these parties lived, a certificate stating, as its father, a person having the same Christian and surname as those of the plaintiff, and, that when some of the payments were made to her by him, her lawyer was in a room nearby, the plaintiff — the defendant Elias not having yet answered — must be deemed to have sufficiently raised, by a fair preponderance of evidence, the question whether Elias has not been guilty of the crime of extortion and obtained these moneys thereby. The appointment *pendente lite* of a receiver of her property, and her restraint from interference with it or disposal of it, and restraining her depositaries from paying her deposits in their hands to her or any one else, are therefore proper, but she is, *pendente lite*, entitled to an allowance sufficient for her comfortable support, to free use of the premises and household furniture, and to her necessary wearing apparel absolutely. Platt v. Elias, 401.

5. *A State court is without jurisdiction to enjoin proceedings in a Federal court — To enjoin a litigant is to enjoin the court.*— A State court has no jurisdiction to enjoin parties prosecuting contempt proceedings before a Federal court in another State, from continuing such prosecution notwithstanding the fact that the State court has jurisdiction of all the parties to the proceedings in the Federal court. To enjoin litigants from proceeding in court is in effect to enjoin the court itself, particularly where the proceedings sought to be enjoined is one to punish for a contempt of court. Johnstown Mining Co. v. Morse, 504.

See **Railroads; Sunday.**

INSPECTION.

See **Discovery.**

INSPECTORS.

See **Elections.**

INSURANCE (FIRE).

1. *Construction of New York standard (eighty per cent.) average clause.*— A fire insurance policy provided that, unless otherwise provided by agreement endorsed on or added to the policy, it should be void if the insured now has or hereafter procures any other insurance on the property covered in whole or in part by the policy, that the insurer should not be liable for a greater proportion of any loss than the amount fixed by the policy bore to the whole insurance on the property, and that the insurer should not be liable for any greater proportion of a loss than the sum hereby insured bears to eighty per cent. of the actual cash value of the property at the time of a loss. At the time of the issue of the policy, upon which the plaintiff brought this action, he had on the property covered by that policy other policies amounting to 175 per cent. of the actual cash value of the insured property, which fact he concealed from the insurer, and when it issued the policy in suit

Digitized by Google

INSURANCE (FIRE) — Continued.
the property became insured for about 200 per cent. of its actual cash value. On the day after the policy in suit was issued the insured took out, without notice to the insurer, another policy which made the total insurance on the property amount to 230 per cent. of its actual cash value. Held, that while the last above stated eighty per cent. clause impliedly authorized the insured to take out, without the written consent of the insurer, additional insurance up to eighty per cent. of the actual cash value of the property, that clause did not cover the insurance obtained by the insured before the policy in suit was issued as that insurance far exceeded eighty per cent. of the actual cash value of the property, and that the policy was thereby avoided. That the policy taken out the day after the issue of the policy in suit, whereby the property became insured for 230 per cent. of its actual cash value, was in itself a distinct act of avoidance. Nestler v. Germania Fire Insurance Co., 97.

2. *Nature and construction of a clause in a policy making the loss payable to the mortgagee as his interest may appear.*— A clause in a policy of fire insurance making the loss payable to the mortgagee as his interest may appear constitutes a separate insurance of his interest, under it the insurer undertakes that the capacity of the property to pay the mortgage debt shall not be diminished and that, if it is diminished by fire, the insurer will pay him the loss, and this although the property in its damaged condition may be more than sufficient to pay the mortgage debt. In order to recover under the clause the mortgagee must prove that his security or interest was damaged. Uhlfelder v. Palatine Ins. Co., 153.

INSURANCE (LIFE).
False answer by the medical examiner.— A false answer to a question in an application for life insurance avoids the policy where the answer was made a warranty. A person insuring must acquaint himself with the terms of the policy and where he delivers it to the insurer who returns him a copy (which he keeps until his death) an answer in the application by a medical examiner of the company, although false, binds the insured where he knew the answer as recorded to be false. Hook v. Michigan Mutual Life Insurance Co., 478.

INTEREST.
Chargeable against a trustee.— Where securities have not been actually set apart to constitute a particular trust, but the trustee pays the life beneficiary thereof interest on the amount at the same rate as that actually earned by the whole assets of the testator in the hands of the trustee, he cannot be charged with any higher rate of interest. Matter of Hoyt, 76.

INTERPLEADER.
1. *Laches.*— Where judgment creditors of contractors with the city of New York — holding moneys earned of it by them — recover judgment in actions, brought against the city and certain assignees of the fund to set aside an assignment of it made by the contractors and have the fund applied on the creditors' debts, and have not made a party defendant to their actions one whom they knew had an assignment of the fund prior to the assignment they sought to set aside, they cannot defeat a subsequent action of interpleader, brought by the city, declining to pay, against all the claimants to be permitted to pay the money into court and have the claimants litigate the matter among themselves, upon the ground that the city was guilty of *laches* in not pleading in their actions the claim of the prior assignee. City of New York v. Cody, 270.

Digitized by Google

INTERPLEADER — Continued.

2. *Of a third person claiming the property.*— Where, in an action of replevin, the sheriff, after taking possession of the property, delivers it to the plaintiff, upon the latter giving the usual undertaking, if a third party interposes a claim to the possession of the property under section 1709 of the Code of Civil Procedure and the defendant makes no claim whatever to the property, the court will make an order interpleading the third party in the place of the defendant, but will make no direction as to the disposition of the property pending the action. Wright Steam Engine Works v. New York Kerosene Oil Engine Co., 580.

See **Replevin.**

JUDGES.

See **Municipal Corporations.**

JUDGMENT.

1. *Validity of a foreign judgment, lacking the judge's signature — Effect of an exemplified copy.*— A duly exemplified copy of a judgment, rendered in an Illinois court of general jurisdiction, although not signed at its end by the judge who presided at the trial, is, where no fraud or mistake is shown, entitled under the Constitution of the United States, art. IV, § 1, to the same credit here to which it would be entitled in Illinois, and where its courts have decided that the judge's signature is not necessary in that State to a judgment's validity, the exemplified copy is competent evidence, for the assignee, of the existence of the judgment. Waters v. Spencer, 15.

2. *Execution, Code Civ. Pro.*, § 1391 — *Retroactive effect of the clause authorizing a judgment creditor to reach his judgment debtor's wages.*— The clause added to the Code Civ. Pro., § 1391, in effect September 1, 1903, authorizing certain classes of judgment creditors to reach a certain percentage of their judgment debtors' wages where they exceed twenty dollars a week, applies to a judgment recovered before September 1, 1903. Meyer v. Halberstadt, 408.

3. *Motion to cancel a judgment against a bankrupt — When a statement in the bankruptcy schedules, under the heading "residence," of the name and address of the judgment creditor's attorneys is sufficient — Fraudulent conveyance executed by the bankrupt before, but not recorded until after, the entry of a judgment against him — When the judgment creditor does not attack the conveyances until after the bankrupt's discharge, he has no lien on the real estate.*— On a motion to cancel a judgment made pursuant to section 1268 of the Code of Civil Procedure which was opposed on the ground that the judgment was not properly entered in the schedules of bankruptcy, inasmuch as there was not stated therein either the residence of the judgment creditor or the fact that such residence was unknown as required by section 7 of subdivision 8 of the Bankruptcy Act, it appeared that the schedules contained the following entries: Under the heading "residence," there was the entry "c/o DeWitt, Lockman & DeWitt, attys, 88 Nassau St., N. Y. C.," and in the column containing a description of the debt, the entry "Deficiency judgment on foreclosure of mortgage entered March 13, '02." It further appeared that the petitioner's attorney examined the city directory and found that it did not contain the name of the judgment creditor; that the verification of the complaint in the foreclosure suit stated that the plaintiff was absent from the United States, but did not disclose his whereabouts; that inquiry for the judgment creditor was made at the office of the attorneys of record, who stated that all communications for the judgment creditor should be addressed to them. It also appeared that a member of that firm was the attorney in fact for the judgment creditor. No claim was made that the judg-

Digitized by Google

JUDGMENT — Continued.
ment creditor was not fully informed of the steps taken in the bankruptcy proceedings. *Held* that under the circumstances the petitioner in the bankruptcy proceedings might, with technical truthfulness, have stated in the schedules that the judgment creditor's residence was unknown. That, in view of the information received from the judgment creditor's attorneys, the entry made in the schedules was proper, was calculated to, and had the effect, of giving notice to the creditor. It appeared that the judgment was docketed on March 17, 1902; that in the previous January, the petitioner executed and acknowledged certain deeds (alleged by the judgment creditor to have been executed in fraud of creditors); that in July, 1902, the deeds were recorded; that on March 20, 1903, the petitioner was adjudged a bankrupt and on June 19, 1903, received her discharge, and that no action attacking the conveyances was commenced until June 13, 1904. *Held* that, under the circumstances above stated, the interest of the judgment creditor in the real estate was not, either at the time of the adjudication in bankruptcy or at the time of the discharge, of such a character that it could be regarded as a lien, and consequently embraced within the saving clause of section 1268 of the Code of Civil Procedure. That the fact that the conveyances sought to be assailed were not recorded until after the docketing of the judgment did not exempt the creditor from the obligation of beginning an action to set them aside in order to give his interest the character of a lien. Matter of David, 516.

4. *In personam and In rem — Personal service or an appearance is necessary in the first and constructive service is sufficient in the second — A summons will not justify a judgment by default in favor of one not named therein — Recitals as to appearance by an attorney — Proof as to his authority.*— A judgment *in personam* cannot be rendered without personal service of notice upon the defendant or his voluntary appearance. A judgment *in rem*, however, may, where the *res* is present within the jurisdiction, be rendered without any other notice to the defendant than such constructive service of process as the local law may prescribe. A summons giving notice of a definite claim asserted by a designated plaintiff will not support the rendition against the defendant, who did not appear, of a judgment *in personam* upon an additional claim in favor of another person not named therein. A recital in a judgment that the judgment debtor appeared by a certain attorney is conclusive as to the fact of the attorney's appearance, but the question of the attorney's authority to make the appearance is open to proof on behalf of the judgment debtor wherever an attempt is made to enforce the judgment. Korman v. Grand Lodge, 564.

See **Corporations; Divorce; Lien Law; Surrogate's Court.**

JURISDICTION.

1. *When lost — Justice's court.*— By the adjournment of an action, in justice's court, for more than eight days (made after joinder of issue and one adjournment by consent) against the defendant's objection, the justice loses jurisdiction which is not restored by the defendant's subsequent participation in the trial. Wright v. Shepherd, 454.

2. *Of a foreign action when not taken by the Supreme Court.*— Although, by service of the summons on the defendants, and their appearance in court, the Supreme Court of the State of New York acquires jurisdiction of an action brought in that court by a stockholder of the Mexican Sugar Company, a New Jersey corporation, to restrain it and the Mexican Sugar Refining Company, a Louisiana corporation, from attempting to cancel a lease, of a sugar plantation, situate in the Republic of Mexico, held by the Mexican Sugar Company by *mesne* assignment under the Mexican Sugar Refining Company, from taking ad-

Digitized by Google

JURISDICTION — Continued.
vantage of any real or pretended cancellation of the lease and from entering or possessing itself of the plantation otherwise than under the lease and to restrain the Mexican Sugar Company from assisting or co-operating in any way in such cancellation or asserting rights in the plantation otherwise than under the lease, yet where the only property owned by either defendant is located in the Republic of Mexico, the court, both because its mandate if issued would not be enforcible and because the dispute concerns only the internal affairs and management of the defendants, will not take jurisdiction of the action and especially where the plaintiffs have commenced another action in a Federal Court, against the said Mexican Sugar Company, in which they seek the appointment of a receiver. Jacobs v. Mexican Sugar Refining Co., 409.

See County Courts; Courts of Special Sessions; Justice's Court; Surrogate's Court.

JUSTICE'S COURT.

1. *City of Hornellsville — Its justice's court is not an "inferior local court", as defined in the Constitution — Its jurisdiction.*— Section 12, added to title six of the charter of the city of Hornellsville (L. 1888, ch. 40) by L. 1889, ch. 125, providing that its justices shall have the same jurisdiction as justices of the peace of the several towns of the State and where either or both of the parties reside in any of the towns of Steuben county adjoining the *town* of Hornellsville, is a valid enactment under section 18 of article VI of the State Constitution, as amended in 1869 — in force when the charter of Hornellsville was enacted — authorizing justices of the peace to be elected in the different cities of the State in such manner and with such powers and for such terms, respectively, as shall be provided by law. Service of a summons on a defendant residing in a town adjoining the town of Hornellsville — out of which the city was erected — in that adjoining town, confers jurisdiction upon the justice of the peace of the justice's court of the said city therein residing who issued the summons. The said justice's court is not an "inferior local court" within the meaning of section 18 of article VI of the State Constitution. Lantz v. Galpin, 356.

2. *Duty of the justice to try the case.*— That, in an action in justice's court, the defendant, by affidavits presented and read on the return of the summons, charged, and the justice denied that he, on the trial before him of a former action, said, in court, that he would not believe the defendant or his counsel under oath, affords the justice no right or reason to dismiss the action with costs against the plaintiff. Truesdell v. Winne, 451.

See Jurisdiction.

KINGS COUNTY.
See County Courts.

LACHES.
See Interpleader.

LANDLORD AND TENANT.
See Eviction; Lease.

LEASE.

1. *Construction — "Conditional limitations".*— A lease stated that the tenant took, "subject to the conditional limitations hereinafter stated", an apartment to be occupied as a strictly private dwelling apartment by his family of four persons, and not otherwise, that he agreed that the occupation of the demised premises by himself and

Digitized by Google

LEASE — Continued.
family and the character of the occupancy were an especial consideration for the granting of the lease, it further states that the landlord expressly reserved the right to terminate the lease on five days' notice in writing of his intention to do so and that upon the giving and expiration of the notice the term should end, anything before contained in the lease to the contrary notwithstanding, and this was followed by the words: "this provision being intended by the parties hereto as a conditional limitation and to be so construed in all litigations and proceedings concerning it". Held, that where no rent was due and unpaid the landlord could not arbitrarily terminate the lease on five days' notice, and this because the "conditional limitations", subject to which the lease was accepted, restricted the tenant to use the premises as a strictly private dwelling apartment for himself and family and his right to remain therein depended on a continuation of that situation — the right given the landlord to dispossess him on five days' notice being in a case where there had been a change in the occupation or character of the occupancy. "Limitation" means restriction, and "conditional" has reference to a situation, state or external circumstance. Schwoerer v. Connolly, 222.

2. *Summary proceedings — Defects in an instrument alleged to be a lease.*— If a memorandum, written on a card, signed by the landlord only, and reading "New York, April 15, 1901. I hereby lease the stoop floor at 174 Orchard St. south side to Mr. Miller from 1901 to May 1st, 1905, for the sum of $17. per month" can be called a lease under the doctrine that one who has delivered a contract, subscribed by himself, is estopped from denying that it was well executed, the instrument is insufficient to support dispossession proceedings by the assignee of the landlord, for, being for a period exceeding three years, it would be a "conveyance" within section 240 of the Real Property Law, would require record under section 241 thereof and could not be recorded because unacknowledged. Jokinisky v. Miller, 239.

3. *Considered recorded from time of delivery to clerk.*— A lease, duly acknowledged and delivered for record to the proper county clerk, is, by virtue of L. 1896, ch. 547, § 266, to be considered recorded from the time of delivery, entitled thereafter to the protection of the Recording Act, and a *bona fide* purchaser, on a sale in foreclosure under a mortgage subsequently given by the owner of the fee to a third party for value, takes subject to the lease and is chargeable with knowledge of its existence, although the clerk never recorded it. Reid v. Town of Long Lake, 370.

See **Eviction.**

LIEN.

Not recoverable of the adversary if the attorney's own client is solvent. — Where the plaintiff in an action is solvent and able to pay his attorney he cannot recover the amount of his agreed lien of the defendant. Gurley v. Gruenstein, 268.

LIEN LAW.

Meaning of the term "creditor" as used in the.— A person not having a judgment and execution is not a "creditor" within the meaning of sections 90 and 95 of the Lien Law. Cullin v. Ryder, 485.

LIBEL.

Answer of a publisher of a libelous article charging the plaintiff, president of a life insurance company, with knowingly swearing to a false report of its total income — The defendant can set forth no more of the article than the plaintiff seeks to recover upon but he may be

Digitized by Google

LIBEL — Continued.
given leave to amend his answer, deny he published the article as the plaintiff alleges he did, and deny that it, as shown in the complaint, is complete — Repetitions of former allegations and denials of an answer are improper — When irrelevant matter stricken out of an answer is available in mitigation of damages — That the plaintiff has failed in other suits for libel is immaterial — Matters competent in mitigation of damages.— Where a plaintiff sues one for damages, for publishing in his monthly magazine, of and concerning the plaintiff, an article virtually charging him with perjury in putting, in reports of the total income of the company for 1900, verified as correct by him as president, as published by the insurance departments of Connecticut, Wisconsin, New York and Massachusetts, the company's income, as reported to Connecticut, at a figure which he knew to be false, the defendant cannot allege in his answer the whole article nor any more of it than the part on which the plaintiff seeks to recover, but may, by copy annexed, set up the article he published, deny he published the article alleged by the plaintiff, and allege that it as published by the latter is complete. Repetitions of allegations and denials, contained in former paragraphs of the answer, must be stricken from subsequent ones as unnecessary. As it is not necessary for the defendant to prove the truth of any portions of the article not pleaded by the plaintiff, matter relevant to those portions, upon being stricken out, must be stricken from the answer, but the same matter may be allowed as a part of a second and partial defense in mitigation of damages. Allegations of the answer, that other publishers of publications have been unsuccessfully sued for libel by the plaintiff, are immaterial. Allegations of the answer, that statements of the company, as contained in the above mentioned state insurance department reports, show its assets as decreasing, its liabilities as increasing, death claims as delayed in payment, and complaints from members as to the management, and further allegations that the defendant had received many letters from dissatisfied members calling for redress and a better management — all pleaded as separate or partial defenses and in mitigation of damages and alleged to be matters within the plaintiff's knowledge — are competent in mitigation of damages and on the question of malice. Matters set up in mitigation will not be stricken out as irrelevant and redundant if the court has the slightest doubt as to its admissibility. Allegations of the answer, that the defendant has examined certain books purporting to contain the report of the company and that he found the questions as to income and "disbursements" differently answered in different reports for the same year, are admissible for the same reasons, and this although the plaintiff is, by the article in question, charged only with swearing falsely as to reports relative to income. An allegation of the answer, that the defendant knew the company had been excluded from doing business in Minnesota and other States, is immaterial where there is no proof that the exclusion, if any, had any relation to the libelous charge made by the plaintiff. Burnham v. Franklin, 299.

LIFE INSURANCE COMPANIES.
See Corporations.

LIQUOR TAX LAW.
1. *Local option — Duty of town clerk to post printed notices — Adding fifth question — Grounds for resubmission.*— A submission at a biennial town meeting of the local option questions is void where the town clerk fails to post in four public places in the town printed notices of the meeting, at the time and in the form and manner required by the Liquor Tax Law, but that law does not require him to exhibit at his office the sign and board-space below it, prescribed by the Town Law (L. 1890, ch. 569, § 86) or to post the notice on the board-space. His adding, to the four printed statutory questions, a

Digitized by Google

LIQUOR TAX LAW — Continued.
fifth printed question as to whether the town labor system of taxation for working its highways should be changed to a money system, is a circumstance favoring ordering a resubmission, as such a provision on the ballot may have tended to mislead and confuse the electors. That eight-tenths of the taxpayers and business men of the town petition for a resubmission upon the ground that the result of the vote on the local option questions — confining the sale of liquor to pharmacists on a physician's prescription — has proved injurious to general prosperity and business in the town, is a further circumstance favoring ordering a resubmission. Matter of Smith, 384.

2. *Local option.*— Where a town clerk files with the county treasurer, and with the State Department of Excise, a detailed certificate or statement of the result of an election as to local option — whose details have evidently been obtained by him from the returns filed with him by the town inspectors — the certificate or statement must be deemed presumptively correct, and, although the result of the vote has never been ascertained or determined by the town board, the result, as shown by the certificate, must be upheld, and, in accordance with it, the county treasurer must issue, or withhold, a liquor tax certificate. People ex rel. Lasher v. Adair, 444.

See Veterans.

LIS PENDENS.
Cancellation — Validity of the cause of action not triable on the motion.— The right to file a notice of *lis pendens*, in a proper action, e. g., one to compel specific performance of an executory contract for the sale of real estate, is an absolute right and the notice when once filed can be canceled only in the cases prescribed by Code Civ. Pro., § 1674. The court has no right or power, upon a motion to cancel, to consider the question whether the action can be maintained, as that question is for the trial or hearing. Shandley v. Levine, 23.

See Service.

LOCAL OPTION.
See Liquor Tax Law.

LUNATICS.
See Fraudulent Conveyance.

MANDAMUS.
See Civil Service.

MARRIAGE.
Action for annulment of — When a court of equity will allow the plaintiff wife counsel fees and expenses.— A court of equity has inherent power to and will allow a married woman counsel fees and expenses to enable her to carry on an action she has begun for the annulment of her marriage upon the ground of her husband's physical incapacity where she shows upon the motion that he knew before marriage of his incapacity and had admitted that he married her for the sole purpose of getting a housekeeper. Gore v. Gore, 323.

MASTER AND SERVANT.
To create liability of the master for an act of the servant the plaintiff must show affirmatively that the latter's act was within the general scope of his authority.— The master is responsible for an act of his servant, done within the general scope of the employment, while engaged in the master's business and to further it, and this whether the act be done negligently, wantonly, or even willfully, but the plaintiff must establish by a preponderance of evidence that the servant acted within

Digitized by Google

MASTER AND SERVANT — Continued.
the general scope of his authority, apparent authority being insufficient. Kessler v. Deutsch, 209.

MISDEMEANOR.
See **Courts of Special Sessions.**

MORTGAGE.
See **Building and Loan Associations; Foreclosure.**

MOTIONS AND ORDERS.
Motion for non-suit — Questions arising thereon where decision is reserved until after verdict.— Where the decision of a motion for a non-suit is reserved until after the verdict, all questions are before the court which could be raised upon a motion to set aside the verdict except such as relate to inferences to be drawn from the evidence or in respect to the weight thereof. Zeizer v. Cohn, 462.

MUNICIPAL CORPORATIONS.
1. *When payment of an assessment for a local improvement, valid on its face but void for facts dehors the record, has not been made under duress of law — Such an assessment must be set aside before the payment can be recovered — Power of the Legislature to prohibit an action to recover an invalid assessment for a local improvement, except upon compliance with certain conditions.*— Where an owner of land upon which has been laid an assessment, apparently valid but actually void by reason of facts *dehors* the record, pays the assessment with full knowledge of those facts before any attempt has been made to enforce it, he cannot recover of the municipality the payment as one made under duress of law, nor can he recover it at all unless the assessment is first set aside. The charter of second class cities (L. 1898, ch. 182, §§ 466, 467) providing, in section 466, an exclusive remedy for the party aggrieved, in the case of assessments alleged to be void for fraud, defect in the work or substantial error, and precluding any resort to a bill in equity, is a valid enactment, as there can be no question of the power of the Legislature to prohibit an action to recover an invalid assessment for a local improvement, except upon compliance with certain conditions. McCall v. City of Rochester, 129.

2. *L.* 1892, *ch.* 685 — *Investigation of the financial affairs of a town — It is a "special proceeding" — How continuable where the officer before whom it was begun becomes disqualified.*— A proceeding instituted by freeholders of a town for an investigation of its financial affairs, authorized by section 3 of the General Municipal Law (L. 1892, ch. 685), is a "special proceeding" within the definition of that term in the Code of Civil Procedure, and when begun in the county in which the town is situated before the only justice of the Supreme Court residing in that county may, upon his subsequent disqualification to hear the proceeding, be continued by virtue of Code Civ. Pro., § 52, before a justice of the Supreme Court residing in the adjoining county. Matter of Town of Hadley, 265.

See **Office and Officer; Parties; Taxes.**

MUNICIPAL COURT OF NEW YORK.
1. *Orders appealable — Levy on execution, how discharged pending defendant's appeal.*— An order of a justice of the Municipal Court of the city of New York denying a motion to vacate an order of arrest is not appealable. *Semble*, that where a defendant, against whom a judgment has been recovered in said court upon which execution has been issued and levy made thereunder on his personalty, files a notice of appeal and serves upon the plaintiff an undertaking, in the form required by the Municipal Court Act (L. 1902, ch. 580, § 314), for more than $100 and for twice the amount of the judgment but in an amount less

Digitized by Google

MUNICIPAL COURT OF NEW YORK — Continued.
than $500, the effect of the service is merely to stay further proceedings under the execution, and if the defendant desires to discharge the levy he should file a new undertaking, of similar conditions, in $500, in which event the Municipal Court would, under Code Civ. Pro., § 1311, taken in connection with section 20 of the Municipal Court Act, have jurisdiction to make an order discharging the levy. Hyman v. Segal, 226.

2. *Time for ordering a bill of particulars not limited to that of joining issue.*— The power of the Municipal Court of the city of New York to order service of a bill of particulars is no longer governed by Code Civ. Pro., § 2942, but by section 145 of the Municipal Court Act of 1902, which section, unlike the Code section, does not limit the time for making such an order to the time of joining issue. Pough & Co. v. Cerimedo, 246.

MUNICIPAL COURTS.
See County Courts.

MURDER.
See Criminal Law.

NEGLIGENCE.
1. *Not actionable unless there is a violation of a legal duty to exercise care — Liability, as between independent contractors, for the death of a workman of one of them.*— There is no negligence, in a legal sense, which can give a right of action unless there is a violation of a legal duty to exercise care. Where neither the contract of an independent contractor, for the mason work of a building in process of construction, nor any law requires him to place guards around the elevator shafts in the building or keep its floors clear from bricks and mortar naturally accumulating thereon, proof that a workman, of an independent contractor for the electrical lighting of the building, whose work required him to use a workbench of his master located on the floor below and who in order to reach the workbench had to descend a ladder and travel through a corridor and over a pile of brick and mortar left by the mason work contractor opposite an elevator shaft, was last seen at night at the top of the ladder and soon found dead at the bottom of the shaft, which had been left unguarded, does not entitle his administrator to recover damages for his death of the mason work contractor. it appearing that the corridor was well lighted and the workman familiar with the approach to the workbench. Thaney v. A. Frederick & Sons Co., 134.

2. *When a place for work is dangerous — Degree of care required of one necessarily working there — Duty of one, who knows he is there, not to injure him.*— A contractor's employee working on a fence — the contractor is constructing along a trench it is excavating, for a city subway — running parallel to the tracks of a motor street railway distant from one of its tracks about thirty inches and which free space will be reduced one-half by the overhang of a car passing, is at work, necessarily, in a place of obvious danger, and where he is struck and injured, while at work, by a car, he may, although he did not look for the car and so gain time to get out of its way as he might have done, retain a verdict he recovered against the railroad corporation for his injuries, where it is shown on the trial that it was the custom of motormen to signal their approach to the place, that the plaintiff relied on the custom, that the motorman of the car in question admitted that he knew the plaintiff was at work there, and where his testimony that he signaled his approach is disputed by the testimony of the plaintiff and that of his witnesses. The motorman was charged with the duty of giving notice of his approach. A charge of the trial court

Digitized by Google

NEGLIGENCE — Continued.
that the plaintiff was required to exercise only ordinary care is correct. Hennessy v. Forty-Second Street, Manhattanville & St. Nicholas Ave. R. Co., 198.

3. *Unexplained loss of a passenger's traveling bag at night in a sleeping car — When there is sufficient evidence of a carrier's negligence to raise a question of fact as to whether it has done its duty.*— Proof, made in an action brought by a passenger, traveling at night from the Grand Central station in New York city to the Adirondack region, to charge a common carrier for the alleged negligent loss of his traveling bag, to the effect that he put it in his berth on his sleeping car, that the porter told him the bag would be safe there, that afterwards the passenger changed the bag to a state room, he had engaged for his party, to which the conductor and porter had keys but the passenger had not, that he told the porter of the change and that the latter said he would keep his eye on the baggage of the party, that the passenger then left the car, as the porter knew, to go to the dining car, that on his return, three-quarters of an hour later, the bag had disappeared, and that before his return a door of the car, very near his state room, which had been locked when he went to the dining car, was unlocked before the train reached the One Hundred and Twenty-fifth street station in New York, affords sufficient evidence to raise a question of fact whether the carrier had done its duty to the plaintiff and a judgment entered on a verdict for him will be affirmed. Arthur v. Pullman Co., 229.

4. *Right of a farmer to clear his lands by the use of fire — When he has not been negligent and is not liable to a third person, whose property was burned because the fire caught on an intervening lot and was carried therefrom over to the lot of the third person — Recovery in such case predicated on the fire being the direct cause of the loss.*— It is lawful for the owner of farm land to use fire in clearing it and he need exercise only ordinary care to prevent the fire from injuring the property of another. Where a farmer, on and prior to the middle of April and after considerable rains, sets fires in stumps on his lands plowed, to be plowed and to be planted to potatoes, and at the end of the month a gale of wind, suddenly arising, sweeps the fires on from the stumps to the adjoining lot of another person, and because that lot contains much dry material, the efforts of the farmer and others wholly to extinguish the fire on that lot, although assisted by a lull in the gale, are not wholly successful, and the fire, by a revival of the gale, is suddenly blown on a lot second removed and belonging to a third person and ignites his wood pile situated thereon, there is no evidence of negligence in the farmer sufficient to make him liable to the third person for the value of the wood burned. The third person must prove, to recover on such a state of facts, that the farmer negligently set or maintained on his lands a fire and that it directly communicated the fire to the wood pile. Hitchcock v. Riley, 260.

5. *Measure of care due a bare licensee.*— A boy, who, while picking some tickets from the ruins of a building destroyed by fire, is hurt by the fall of a wall left standing there, is at best a bare licensee to whom the owner of the building owes no duty beyond that of doing him no affirmative wrong or injury. Haack v. Brooklyn Labor Lyceum Assn., 273.

See Master and Servant.

NEGOTIABLE INSTRUMENTS.

1. *Action on an instrument, alleged to be a certificate of deposit —*

When it is a mere receipt, and not actionable by an assignee thereof, where there has been no transfer of it to him other than by endorsement

Digitized by Google

NEGOTIABLE INSTRUMENTS — Continued.
and delivery.— An instrument reading: "Mexico. $5,000. Certificate of deposit in favor of The International Money Box Company. Mexico, February 1, 1902. We hereby certify that we have on this date placed to the credit of the International Money Box Company of New York and Chicago the amount of $5,000 (five thousand dollars) United States currency. This amount is left on deposit in this bank with the understanding that it is not to be withdrawn for two years, counted from this date, in consideration of which we hereby agree to pay the International Money Box Company straight interest at the rate of 7% (seven per cent.) per annum. The American Bank. F. J. Dunkerly, cashier" is not a negotiable instrument for the payment of money, contains no promise to pay the deposit, is a mere recital evidencing the payment, is assignable only as any other chose in action is assignable, and, when merely endorsed and delivered for value to an assignee, gives him no cause of action upon which he can recover thereon of the bank or procure an attachment on the action. Young v. American Bank, 305.

2. *Certificate of deposit — Assignable by endorsement and delivery where it possesses negotiable attributes — Demand — Affidavit of demand and non-payment on information and belief, when insufficient.*— An instrument reading: "Mexico. This is to certify that the International Money Box Co. of New York has a deposit of the amount of three hundred dollars ($300) U. S. currency in this bank, which deposit bears interest at the rate of seven per cent. (7%) per annum, payable annually. This certificate is due two years from this date, or on the seventh of April, nineteen hundred and four, and will be cashed only upon being returned to the bank by the International Money Box Co. of New York or their order. City of Mexico, April 7, 1902. The American Bank. F. J. Dunkerly, cashier" must be deemed transferable by endorsement and delivery as it has negotiable attributes, these consisting in the promise to pay the depositor or order and in the provision for a return of the instrument before payment will be made. Demand of payment must be made before a cause of action can accrue as a certificate of deposit is not due until demand made. Where the certificate is to the depositor's order the demand must correspond with the obligation of payment and that requires presentation to the bank of the certificate, properly endorsed. Where an affidavit, made in an action brought by an assignee of the certificate to recover upon it of the bank and to procure an injunction in the action, states demand and refusal of payment on information and belief, without stating the sources of information or the grounds of belief, it is insufficient to support the injunction. Young v. American Bank, 308.

See **Corporations.**

NEW TRIAL.
Motion for, on newly-discovered evidence — What the moving party must show — When a new trial will be ordered — Abolition of the rule respecting cumulative evidence.— On a motion for a new trial on the ground of newly-discovered evidence, it is necessary that the moving party show that the newly-discovered evidence will probably change the result of the previous trial, that it was discovered by him since such trial and could not have been discovered by the exercise of due diligence before the trial and that it is material to the issue. If, by reason of such newly-discovered evidence, a different outcome is probable and the jury can fairly reach another conclusion, the court is justified in the exercise of its legal discretion in ordering a new trial. The rule which formerly obtained that a motion for a new trial on the ground of newly-discovered evidence will be denied where such evidence was cumulative has been abolished. The proper inquiry is whether the newly-discovered evidence, whether cumulative or not, is of such

Digitized by Google

NEW TRIAL — Continued.
a character that it is likely to produce a different result on a new trial. Hagen v. New York Central & Hudson River R. R. Co., 540.

NEW YORK CITY.
See City of New York.

NON-SUIT.
See Trial.

OFFICE AND OFFICER.
Proceeding under Code Civ. Pro., § 2471a, by one elected to an office to obtain possession of its books and papers from the former incumbent holding over the term — Prima facie title in the person elected sufficient — When such title exists in one claiming as city and common council clerk of the city of Troy — Definition of "vive voce" vote.— While the court, in a proceeding taken under Code Civ. Pro., § 2471a, by a person elected to an office to compel by order delivery to him of its books and papers withheld by a former incumbent holding over the term, will not try title to the office, a mere denial of title is insufficient to defeat the proceeding and the court will look into the matter far enough to determine whether the petitioner has a *prima facie* title. Where it appears that he has received a certificate of election or appointment from the proper person or persons he has such title and is entitled to maintain the proceeding. The fact that his title turns on difficult questions of law will not defeat his right. In Troy, a city of the second class, subject to L. 1898, ch. 182, and having a common council of seventeen members, a majority thereof constitutes a quorum and a majority of the quorum may elect a clerk of the common council and of the city. A person who, all members of the council being present when a regular meeting thereof was called to order, received for such offices a majority of the votes cast when nine members of the council were still present at the meeting, who received and duly filed a certificate of his election executed by the president of the common council, the former incumbent refusing to issue one, and who duly filed his oath of office, must be deemed to have *prima facie* title to the offices and may maintain a proceeding to compel the former incumbent to deliver him the books and papers. The provision of the thirty-third section of the said act of 1898 that "All appointments or designations made by the common council shall be by *viva voce* vote" does not necessarily mean that each member must orally announce his choice and when a nomination is made either by a written resolution or oral motion and each member announces his vote for or against it by his voice, the vote is *viva voce*. Matter of Brearton, 247.

PARTIES.
When the court should not direct a third party to be brought into an action.— A controversy, existing between the city of New York and a school district which had issued certain bonds before a part of the district was incorporated into the city by the charter of 1897, as to what part of the indebtedness is chargeable upon each municipality, affords no reason for the court to direct the city to be made a party to an action, brought by a bank, a holder of the bonds, against the board of the district, to recover interest on the bonds due and unpaid because of the controversy, and this because the school district should adjust its dispute with the city without making the plaintiff a party to the litigation or delaying the present action. Southold Savings Bank v. Board of Education, 74.

See Actions; Foreclosure; Pleading; Surrogate's Court.

PARTITION.
Unsecured creditors, of the deceased owner of the fee, when protected in partition — Avoidance of multiplicity of actions.— Where unsecured

Digitized by Google

PARTITION — Continued.
creditors, of a decedent intestate whose personalty proved insufficient to pay his debts, and who, as well as the administrator of the decedent, took no proceedings to sell his real estate for his debts within three years after letters of administration were first issued upon his estate, are made parties to an action, brought by the heirs, to partition his real estate, and it therein appears that, on the final accounting of the administrator to which the heirs of the decedent were parties, the claims of these creditors were established, the Supreme Court will, in the action of partition, protect the creditors and, to avoid multiplicity of actions, will not remit them to their action against the heirs under Code Civ. Pro., § 1843, it appearing that there are many heirs, that some are non-residents of the State of New York and that the shares of some are very small. Hughes v. Golden, 128.

PARTNERSHIP.
Action for a dissolution of a partnership, etc.— Complaint — When the plaintiff must prove affirmatively that the parties intended to and did form a partnership — A complaint under which proof of a joint adventure would be insufficient — When participation in firm profits does not make one a partner.— Under a complaint, in an action brought for the dissolution of a partnership and for the appointment of a receiver of its property and for an accounting, alleging that on a certain date the plaintiff and the defendant entered into a partnership to carry on certain city contracts the defendant had secured, that since that date they as partners had undertaken and agreed to perform some of the contracts, had completed some and partially completed others and earned profits, and that the defendant withholds the plaintiff's agreed share of one-half of the net profits besides denying him access to the firm books as well as an account of its business, the plaintiff must fail unless he proves affirmatively that the parties intended and agreed to enter into a partnership *inter sese*. Under such pleadings the establishment of a joint adventure would be insufficient. Mere participation in firm profits as a means of compensation, without liability for firm losses, does not make a partner in the firm one receiving such compensation, and if entitled thereto as employee he cannot obtain it in such an action as the above. Smith v. Dunn, 288.

PAYMENT.
Affirmative defence.— Payment in an affirmative defence, which cannot be raised by a denial. First National Bank v. Jennings, 374.

See Guaranty.

PENAL CODE.
§ 259. People v. Poole, 118.
§§ 259, 260. Dunham v. Binghamton & Lestershire Baseball Assn., 112.
§ 265. Dunham v. Binghamton & Lestershire Baseball Assn., 112.
§ 265. People v. Poole, 118.
§ 290. People v. Zabor, 633.

PLEADING.
1. *Objection that the plaintiff has not legal capacity to sue when waived.*— The objection that a plaintiff has not legal capacity to sue can be raised only by answer or demurrer upon such ground and if not so raised is waived. Waters v. Spencer, 15.

2. *Action against a corporation, organized under the Banking Law, for a breach of its covenant that on or before a certain date the plaintiff should receive a certain sum of money for certain securities and that the date had passed without payment — Sufficiency of the complaint — Demurrer to defenses — Ultra vires not a defense to a corporation where the other party has fully executed the contract — When the contract*

Digitized by Google

PLEADING — Continued.
is not against public policy nor mala in se, or mala prohibita within section 159 of the Banking Law — When a defense that the plaintiff had not marketable title is bad — Defense of false representations, to the effect that certain stocks were not assessable, when demurrable — Counterclaim for deceit, when demurrable — When admissible under Code Civ. Pro., § 501.— A complaint, against a domestic corporation organized under the Banking Law, which alleges that the plaintiff owned stocks and bonds of a ship building company, on August 28, 1902, put them at the disposal of the defendant giving it a right to sell them according to its judgment and discretion, that the defendant agreed that on or before August 25, 1903, the plaintiff should receive for them a named sum of money, that the plaintiff placed them at the disposal of the defendant and made no further attempt to sell them and tendered them repeatedly to the defendant and that August 25 passed without payment, states a cause of action. Further held, that, a first separate defense alleging that the contract was *ultra vires* of the corporation was demurrable, as the plaintiff had fully executed the contract, even though he was still in possession of the securities. That, the contract was not void as against public policy or *mala in se*. That, it was not *mala prohibita*, within section 159 of the Banking Law, prohibiting such a corporation from holding stock in any private corporation to an amount in excess of ten per cent. of the capital of the corporation holding such stock; and that, beyond that, nothing in the contract showed that the securities were intended by the parties to constitute part of the capital of the defendant, or that the defendant was intending, or that the plaintiff knew the defendant was intending, to invest any trust funds in the stock of the ship building company. Third and fourth separate defenses, alleging that the plaintiff was a director and large stockholder in a Delaware corporation and cognizant of its affairs, that, by false representations he succeeded in selling that corporation to the ship building company, receiving payment in part in securities of that company and in part in cash, and that, although he covenanted that the Delaware corporation should, when sold, be free from debt and liens, except as specially provided and excepted, it was not so free, do not tend to establish allegations of these defenses that the plaintiff received the securities, he placed at the disposal of the defendant, fraudulently and had not and could not make marketable title to them. Assuming that the ship building company might have rescinded, the plaintiff's title was good as far as the defendant was concerned. These defenses are bad as resting on a contingent defeasability of title which has not become actual. A fifth separate defense, repeating the allegations of the third and fourth separate defenses, and then alleging that, when the contract was made, the plaintiff knowingly falsely represented the stocks of the ship building company as full paid and not assessable and that, on the contrary, the holder "was liable for further assessments * * * by reason of the allegations in the foregoing Third and Fourth defenses of the defendant", is bad where examination of those defenses discloses that they contain nothing to show that the stocks were not fully paid, and where the statute in that regard, of the State of the domicile of the ship building company, has not been pleaded. A counterclaim, which alleges a consummated contract made between the plaintiff and other stockholders of the Delaware corporation and one Nixon or others, by which the properties of that corporation were to be sold and which further alleges that, in order to induce the defendant to advance to the plaintiff the cash part of the consideration, the plaintiff made false representations to the defendant, and that it, relying thereon, paid out the cash to assist Nixon or the others, with the result that the money was "wholly lost to the defendant", while admissible under Code Civ. Pro., § 501, is demurrable, as the claim is for deceit and no facts are alleged from which it can reasonably be inferred that the money was "wholly lost

Digitized by Google

to the defendant." The mere fact, that advances were made to a third party on the plaintiff's false representations, does not *per se* establish loss in any amount to the defendant. Gause v. Commonwealth Trust Co., 46.

3. *Action by a son to compel specific performance of a testator's covenant, made with his son in an ante-nuptial agreement relative to his marriage, that he would make no distinction between his children in disposing of his estate by will — Breach, by a codicil having the effect of giving the other children an advantage — Demurrer to complaint — Parties — Jurisdiction of the surrogate in regard to a will — Res adjudicata.* — The complaint in an action for specific performance alleged that a testator, then having a wife, a son, the plaintiff herein, and two daughters, covenanted, in an ante-nuptial agreement made in 1873 four days prior to the plaintiff's marriage, by the parties thereto, the father of his fiancee, and the testator and his wife, that he and his wife would make no distinction between their children in disposing of their estates, that the testator made a will, in 1882, giving his residuary estate to the defendant, in trust, to pay his widow and each child the income of one-quarter of the corpus for life, with power to the defendant to pay over to each child, as his or her absolute property, any part of the capital that he or she might, by an instrument in writing duly proved and acknowledged, require, except the sum of $50,000 which the defendant was required to hold during the life of each child for his or her benefit, that upon the death of a child the capital of its share, then held by the trustee, should be paid to the child's appointees by will, or failing that, to children, or, failing both, to the testator's next of kin, that the testator also directed, as to the plaintiff's quarter share, that upon his death his wife should be paid so much of its principal as would secure her the one-fourth of the estate to which she would be entitled under the ante-nuptial agreement, that the share of the widow, since deceased, of the testator, was, upon her death, to be divided among the children and had been entirely distributed. That, in 1887, the testator made a codicil to his will by which he directed the defendant to hold the plaintiff's share, except a dwelling in Paris occupied by him, for his life, pay him the income for life and at his death divide the principal among his heirs, that, in 1890, the executors of the will accounted before the surrogate, paid over the shares to the defendant and were discharged, that the defendant had paid over to the daughters parts of their shares, that the defendant has refused and refuses to pay the plaintiff any of the principal of his share, which, in 1890, was $168,184.82, and the plaintiff demanded as relief payment to him of that amount, less the $50,000, and also abrogation of the trust created by the codicil in question. The plaintiff has no children and his sisters defendant would be his only heirs should he die now. The defendant demurred to the complaint for insufficiency and also on the ground that the executors were necessary parties. *Held*, that the complaint stated a cause of action. That, as to the plaintiff's share, the codicil was violative of the ante-nuptial agreement and void. That the executors were not necessary parties, because the plaintiff never had a cause of action against them. That the decree made by the surrogate was not *res adjudicata* as to the plaintiff, although he and his wife were parties to the proceedings, for the surrogate had no jurisdiction to pass upon an independent contract made between the plaintiff and the testator. Phalen v. United States Trust Co., 57.

4. *A defense of the Statute of Limitations is a separate affirmative defense, not to be assisted by other denials of the complaint unless repeated in the defense — Demurrer to a separate defense of the statute when sustained.* — The amended complaint in an action, begun December 24, 1903, alleged as a first cause of action that between

Digitized by Google

PLEADING — Continued.
December 31, 1896, and April 19, 1897, the plaintiff performed services of a certain agreed value for a New Jersey corporation and that on May 31, 1899, in consideration of a transfer made by it of all its assets to the defendant, a corporation of the same name, the defendant took over all its debts and, with the plaintiff's consent, assumed his, which remained unpaid. The plaintiff demurred for insufficiency to a second defense of the amended answer which, without denying any of the allegations of the complaint, set up the six years' Statute of Limitations as a defense to the first cause of action. The answer, beside this second defense, contained denials of the allegations of the complaint. From an interlocutory judgment sustaining the demurrer the defendant appealed. Held, that as the affirmative defense of the statute — which was to be treated as a separate plea, not to be assisted by denials contained in other parts of the complaint unless incorporated in the plea by reference — merely set up the statute as a defense to the first cause of action, it admitted that cause of action and sought to bar it. That the cause of action did not accrue until May 31, 1899, when the defendant assumed the plaintiff's debt, because the debtor was a foreign corporation and as such precluded from pleading in our courts the statute as a defense and that, as the statute was clearly insufficient as a defense to this action, a demurrer to the defense would lie, as a demurrer admitted only facts alleged and not mere legal conclusions. Gray Lithograph Co. v. American Watchman's Time Detector Co., 206.

5. *Conditions precedent — Code Civ. Pro.*, § 533 — *Failure of the plaintiff to plead that he "duly" performed, etc.— He has no right to interline "duly" in the original complaint.*— Where an amended complaint served in an action to recover upon a fire insurance policy does not allege the facts showing performance by the plaintiff of its conditions, the defect is not cured by a general allegation of performance, permitted by the provisions of Code Civ. Pro., § 533, relative to pleading conditions precedent, where the word "duly", required by that section, is omitted. The plaintiff has no right to interline this word in the original of the copy complaint served, as the defendant has a right to consider the complaint served as the one he is to answer and that the cause is to be tried upon the issues raised by his answer to that complaint. Guarino v. Fireman's Insurance Co., 218.

6. *Allegations of complaint, when frivolous.*— Where allegations of the complaint of the endorsee of promissory notes in an action brought upon them against the maker, that the payee endorsed and delivered them to the plaintiff and that the latter ever since has been and now is their owner and holder, are not denied by denials that the notes were "transferred or delivered by the lawful or other holder to the plaintiff" or that the plaintiff "is the lawful owner or holder of said notes," are frivolous. First National Bank v. Jennings, 374.

7. *Striking out irrelevant matter sparingly exercised in an equity case.*— No part of a pleading will be stricken out as irrelevant unless the court can see that the moving party is aggrieved by it and that striking it out will not harm the pleader. *Semble*, that in equity actions greater latitude and liberality are allowed in the preparation of pleadings than in other actions, and that the power to strike out from such pleadings matter which is claimed to be irrelevant should be used with reluctance and caution. Palmer v. Day, 579.

8. *Complaint — Allegations as to tortious conduct do not make the action one in tort — Waiver of the tort.*— Where the gravamen of a complaint is on contract, the fact that there are allegations therein charging tortious conduct on the part of the defendant is not enough to make the action one sounding in tort. Where the facts alleged in

Digitized by Google

PLEADING — Continued.
a complaint will support an action in tort, the plaintiff may waive the cause of action in tort and rely upon assumpsit, where the facts authorize such an action. Such an election, when once made, precludes the plaintiff from thereafter proceeding as in an action for tort. The rule is otherwise where a counterclaim is interposed which sets up a distinct and independent cause of action. Price v. Parker, 582.

See Courts of Special Sessions; Fraudulent Conveyances; Libel; Partnership.

POLICE.
Inexcusable conduct of.— A descent upon rooms — where the accused were merely collecting by telegraph and telephone news as to the horse races — made by an inspector of police, a captain thereof, and twenty policemen, who arrested twenty-one employees of the place, took them to the police station and held them there over night and carried there all the electrical instruments, books and papers in the place, is, where the police had not seen the prisoners do any criminal act and could not prove before the committing magistrate their commission of any such act, an inexcusable violation of the inherent and constitutional rights of liberty and property. People ex rel. Hammond v. Breen, 375.

See Injunction.

POUNDAGE.
See Sheriffs.

PREFERENCE.
See Calendar.

PUBLICATION.
See Service.

RAILROADS.
1. *Liability thereunder of a street surface railroad for failing to maintain cattle guards at a road crossing in the country.*— The provisions of section 32 of the Railroad Law, requiring every railroad corporation to maintain cattle guards at all road crossings sufficient to prevent cattle, etc., from going upon its railroad, apply to a street surface railroad company incorporated under section 1 of that act, and where the company fails to provide such guards at a road crossing it is liable, to the owner thereof, for the value of a cow which passed from a road to the tracks and was killed there by one of its cars. Evans v. Utica & Mohawk Valley R. Co., 345.

2. *Elevated railroad in New York city — Respective rights of the city and of the railroad company in the street — Expense of underpinning the elevated structure made necessary by the building of a public comfort station — It must be borne by the railroad company, at least in the first instance — Injunctive relief denied.*— A corporation operating an elevated railroad in a public street in the city of New York acquires under its charter a right somewhat in the nature of an easement for the support of its columns and structure, but does not own the fee of any part of the street, and has no exclusive right to the use and occupancy thereof. The city still has the right to make use of the street for proper and authorized urban purposes and is not obliged to consult the mere convenience of the railroad company, or to study to save it from expense to the detriment of the public; the most that the railroad company can insist on is that its structure shall not be unreasonably interfered with. Where pursuant to authority conferred by its charter the city, through a contractor, is constructing a "public comfort station" in the street, the building of which renders it necessary to underpin, at an expense not exceeding $2,000, three of the pillars of the elevated

Digitized by Google

RAILROADS — Continued.
structure in order to secure the safety of that structure, the railroad company in the event of the refusal of the contractor to allow it to perform the work of underpinning at the expense of the contractor is not entitled to an injunction to restrain the building of the public comfort station. *Semble*, that in such a case the railroad must protect its structure at its own expense. In any event it must do so in the first instance and then, if it is ultimately decided that the expense should be borne by the city or by the contractor, it has an adequate remedy at law against them. Interborough Rapid Transit Co. v. Gallagher, 536.

See Condemnation Proceedings; Contract; Injunction.

RECEIVERS.
See Corporations; Injunction.

RECORD.
See Lease.

REFERENCE.
On the ground that a long account must be examined — What issues outside of the account will not prevent the reference. — When a reference of the issues arising in an action at law brought against a firm of cotton brokers by a customer thereof will be ordered on the ground that the trial of such issues will require the examination of a long account and will not require the decision of difficult questions of law, considered. In such a case, the mere fact that the plaintiff's cause of action is disputed, or that issues outside the account are raised, is not alone sufficient to defeat the right to a reference; nor will such right be defeated by the fact that the examination of the long account is made necessary only by the defence interposed, where it appears that the effect of the defence is to make the long account an element in the proof of the plaintiff's cause of action, and consequently, that it cannot properly be considered as a separate or independent issue. Price v. Parker, 582.

RELIGIOUS CORPORATIONS.
When the court will interfere in matters ecclesiastical — When the right to protect the temporalities of a Presbyterian church, which is subject to L. 1902, ch. 97, § 4, subds. 6 and 7, from the alleged unlawful control of persons no longer entitled to act as trustees, vests in the remaining trustees and not in those having the spiritual control of the church. — The general rule as to the right of civil courts to interfere in ecclesiastical matters is that the right exists only where there are conflicting claims as to church property or funds, or their use, or where civil rights are involved. The ruling elders and members of the session of a Presbyterian church, the temporalities of which are managed by trustees elected by those qualified to vote (L. 1902, ch. 97, § 4, subds. 6 and 7) cannot maintain, in their own names and in that of the corporation, an action to enjoin certain defendant trustees of the church from acting as such upon the ground that they have been suspended by the session as communicants for contumacy of the session, where there are other trustees and the complaint, and affidavits on a motion for an injunction, do not show that the other trustees have refused to act, for, if it be assumed that the action of the session disqualified the defendants from continuing to serve as trustees, it is the implied duty of the remaining trustees, in order to prevent any diversion of the corporate property, to see to it that no disqualified person shall act with them in regard to it. Westminster Presbyterian Church v. Findley, 173.

See Will.

Digitized by Google

REPLEVIN.
See **Interpleader.**

RES ADJUDICATA.
See **Pleading.**

RULES.
See **Pleading.**

SALES.
When a warranty of quality does not survive acceptance.— An acceptance by the vendee of personal property, manufactured under an executory contract of sale, after full and fair opportunity for inspection, estops him, in the absence of fraud, from thereafter raising an objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance are accompanied by some warranty of quality manifestly intended to survive acceptance. James v. Libby, McNeal & Libby, 210.

SAVINGS BANKS.
See **Executors and Administrators; Gift; Trusts.**

SCHOOLS.
New York city — Tenure of teachers in Brooklyn.— A person, duly employed as a teacher in the city of Brooklyn when, on Jan. 1, 1898, it became a part of the new city of New York, was continued by its charter (L. 1897, ch. 378, §§ 1114, 1117) in the same position and grade, not merely until the end of the term of that employment but until removed for cause after trial by his school board, and, therefore, where, after the expiration of that term of employment and after Jan. 1, 1898, the city superintendent of schools refused to permit the person to continue as a regular teacher, he is entitled to recover of the city board of education his salary as fixed less anything he has earned in the meantime as a substitute. Bogert v. Board of Education, 10.

SEQUESTRATION PROCEEDINGS.
See **Corporations.**

SERVICE.
Lis pendens — By publication on non-residents.— It is competent for the Legislature to declare — for the purposes of service of process — that "Sunday * * * shall be regarded as the time between sunrise and sunset," and where service on non-residents, of a notice of *lis pendens* is by statute required to be made by publication in a newspaper for four consecutive weeks, the last publication to be at least two weeks before the return day, and the date of the first publication is January 17th and that of the last February 14th, both Sundays, a defendant, who alleges that the notice was not published pursuant to the requirements of the local law and hence that the court had not jurisdiction, must show that the newspaper containing the notice was actually published after sunrise on the Sundays in question. Harrison v. Wallis, 492.

See **Justice's Court.**

SHERIFFS.
1. *Attachment — Attorney when personally liable to sheriff.*— Where the defendant's attorney procures, upon a counterclaim of his client, an attachment against the plaintiff's property and has the sheriff levy thereunder on a debt due the plaintiff and the debtor gives the sheriff a certificate of the indebtedness and the attachment is subsequently vacated upon the ground that the papers upon which it was granted were insufficient in law to justify its issue, the attorney is personally liable to the sheriff for his poundage as fixed in his county by law. Gadski-Tauscher v. Graff, 418.

Digitized by Google

SHERIFFS — Continued.

2. *Decision by a United States court in bankruptcy proceedings that a sheriff was not entitled to poundage — It is conclusive on a motion made by the sheriff in a State court to compel the defendant's attorney to pay the poundage.*— Where a sheriff holding a levy under an execution upon certain property of the judgment debtor at the time that the judgment debtor is adjudged a bankrupt applies for taxation of his poundage and charges to the United States court, which refuses to allow the former, but allows the costs and charges for keepers, the sheriff is not in a position to move before the State court out of which the execution was issued for an order for the taxation of his poundage and the payment thereof by the defendant's attorney. In such a case, if the sheriff be aggrieved by the decision of the United States court, his remedy is by an appeal therefrom; the decision of the United States court cannot be reviewed in a State court. Johnson v. Woodend, 524.

SOLDIERS' HOME.
See Veterans.

SPECIFIC PERFORMANCE.
See Pleading.

STATUTE OF DISTRIBUTIONS.
Code Civil Procedure, § 2732 — Effect of subdivision 12, on subdivision 3. — The provisions of subdivision 3 of the Code of Civil Procedure, § 2732 — that, failing descendants of an intestate, parent, brother or sister, nephew or niece, the surviving widow is entitled to the whole surplus — have not been affected or impaired by the provisions of subdivision 12 of the section, declaring that representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate. Matter of Hardin, 441.

STATUTE OF FRAUDS.
Oral agreement for the sale of land.— Where an oral agreement for the sale of land is not performed in the detail of payment by the vendee of the purchase price, the agreement is not performed and executed and therefore is void under the Statute of Frauds. Commins v. Perry, 458.

STATUTE OF LIMITATIONS.
See Pleading.

STATUTES.
Presumption as to foreign laws — The lex fori governs the remedy and procedure.— The presumption, in the absence of proof to the contrary, that the law of a foreign State is like our own does not extend to positive statutory law. The *lex fori* governs in all matters relative to the remedy and the course of procedure. Waters v. Spencer, 15.

See Assignment for Benefit of Creditors; Attorneys; Boards of Health; Civil Service; Constitutional Law; Convicts; Criminal Law; Gaming; Highways; Justice's Court; Lease; Municipal Corporations; Municipal Court of New York; Office and Officer; Pleading; Railroads; Religious Corporations; Schools; Stenographers; Taxes; Transfer Tax; Will.

STENOGRAPHERS.
Of the commission created by chapter 537 of the Laws of 1893 — He is not entitled to compensation for a period during which the commission was temporarily out of existence.— Where the members of the commission created by chapter 537 of the Laws of 1893 and continued by the amendments thereof made by chapter 567 of the Laws of 1894 and chapter 729 of the Laws of 1900 and by the provisions of various court orders subsequent to the latter date resign in September, 1902,

Digitized by Google

STENOGRAPHERS — Continued.
after their work had apparently been completed, the fact that the commission is revived in 1904 does not entitle the official stenographer of the commission who at the time the former commissioners resigned was serving "during the pleasure of the commission" at a salary of $3,000 per annum, to compensation for the period during which there were not any commissioners in office, and consequently no duties to be performed. Matter of Young, 521.

SUMMARY PROCEEDINGS.
Maintainable although the lease provides for a re-entry.— The contention, that where a lease provides for re-entry summary proceedings for non-payment of rent cannot be maintained by the landlord, is without basis in law. Fleishauer v. Bell, 240.

See **Lease.**

SUMMONS.
See **Judgment.**

SUNDAY.
1. *Preliminary injunction — Refusal to vacate one obtained in an equitable action brought by owners of property adjacent to a base ball park, conducted by the defendant, where games of base ball are played on Sunday for which an admission fee is charged, to restrain such playing as constituting an invasion upon the said owners' rights of personal liberty and property.*— In view of the provisions of Penal Code, §§ 259, 260, 265, relative to the observance of Sunday, there is sufficient doubt as to the legal right of a base ball association to conduct on Sunday a base ball game upon its grounds, for entrance to which an admission fee is charged, to justify the Supreme Court in refusing to vacate a preliminary injunction granted in an equitable action brought by owners of property adjacent to the park against the association to restrain such playing upon the claim of said owners that they are likely to suffer a personal injury from the Sunday games, in that the noise and confusion and public parade of the people incident to the game will deprive them of their usual proper and necessary Sunday quiet and rest, and upon the further ground that by such noise, etc., the actual value of their real property, for residential purposes, will be depreciated. Dunham v. Binghamton & Lestershire Baseball Assn., 112.

2. *Playing base ball on Sunday.*— Playing on Sunday — a day declared by Penal Code, § 259, as set apart by general consent for rest and religious uses and upon which day the law prohibits the doing of acts which are serious interruptions of the repose and religious liberty of the community — a game of base ball to which the public is invited and for which an admission fee is charged, is a misdemeanor as it is a violation of Penal Code, § 265, prohibiting, upon the first day of the week, "All shooting, hunting, fishing, playing, horse racing, gaming or other public sports, exercises or shows." People v. Poole, 118.

See **Service.**

SUPREME COURT.
See **Jurisdiction.**

SURROGATE.
See **Accounting.**

SURROGATE'S COURT.
Jurisdiction — Collateral attack — Code Civ. Pro., §§ 2642, 2643, 2695, 2697 — Foreign wills — Domiciliary and ancillary administration and conflict of laws — Distinction between record and probate of foreign will — Essentials of jurisdiction to issue letters in New York State on a foreign

Digitized by Google

SURROGATE'S COURT — Continued.
will, admitted to probate in the testator's domicile — Judgments — Res adjudicata — Collateral attack — Adjudication between foreign representatives of two decedents when a bar to an action on the same subject matter between domestic representatives of the same decedents. — The Surrogate's Court, although now a constitutional court, is still one whose jurisdiction is defined by statute and persons claiming under its decree must be prepared to show its jurisdiction when that is disputed; its lack of jurisdiction may be set up as a defense in an action where the validity of its decree is an essential element of recovery. There is a marked distinction between wills admitted to probate in the State of New York and wills filed or recorded in this State upon an exemplification of the record of probate in another State; the surrogate's jurisdiction to issue letters in the latter class is limited to the issue of ancillary letters testamentary or ancillary letters of administration with the will annexed. The surrogate has no authority to issue ancillary letters upon a will, admitted to record or filed in his court upon an exemplified record of its probate in another State, except to a person named in the foreign letters to administer the estate or to a person otherwise entitled to the possession of the personal property of decedent, unless the consent of such foreign representative, or person otherwise entitled, to the appointment of another person applying for letters, is filed with the petition therefor. Where a surrogate issues such letters to other persons without such consent and the recipients of such letters sue in the Supreme Court, their capacity to sue can be questioned on the ground of the invalidity of their letters by reason of their failure to file such consent with the petition for their appointment. The authority of a surrogate to decree that an executor be deemed to have renounced is limited to wills admitted to probate in his court, and does not extend to an executor named in a will which has been admitted to probate in another State and is merely filed or recorded in his office upon an exemplification of the foreign probate. No one can take out administration in this State, after a foreign probate, except by or through the consent of the foreign executor. A judgment of a court of the United States, sitting in equity, adjudicating between the executor of a decedent, to whom letters testamentary were issued in the domicile of his testatrix, and the local administrator of another decedent, and adjudging that there is no validity in a claim asserted by the said executor against the said administrator by reason of an alleged debt, alleged to have been owing by the latter decedent during his lifetime to the said executor as assets of the estate of his testatrix, is a bar to any action in another jurisdiction, brought by persons claiming to be administrators with the will annexed of the said testatrix, against the domiciliary representatives of the alleged debtor, in the latter jurisdiction. The validity of the judgment which is above stated to be a bar, cannot be assailed, by the administrators with the will annexed, on the ground that it was entered by consent, or pursuant to an agreement of compromise and settlement of the first action. Held, that an action, to which the sole party plaintiff had died, was a *pending* action within the meaning of the law, was transferred thereby and might be revived in the new district by the administrator of the deceased plaintiff, and that a decree, entered after such reviver, in the new district, was within the jurisdiction of the court. That, although testimony had been taken in the cause, by deposition and before special examiners, prior to the creation of the new district, such evidence had not been taken before the judge within the meaning of the proviso, and that the cause was, therefore, not retained in the Eastern District but was transferred to the Southern District by the operation of the law. The practice in the State of New York does not permit an attack upon a former judgment entered by consent, or pursuant to compromise, and adjudicating the same question between privies, pleaded in bar, where it is apparent that the court which entered the decree had jurisdiction of the parties and

Digitized by Google

SURROGATE'S COURT — Continued.
the subject matter, obtained without fraud, and no fraud was practiced upon the court, or by either of the parties to the suit upon the other, in the entry of the decree. Baldwin v. Rice, 64.

SURPLUS MONEYS.
Foreclosure.— Where a new claim for surplus moneys is filed between the time of the application for the reference and that of the entry of the order, the claimant must, under Rule 64 of the General Rules of Practice, have notice, *nunc pro tunc*, of the application for a reference before the justice can sign the order. Schieck v. Donohue, 425.

SUSPENSION OF POWER OF ALIENATION.
See **Will.**

TAXES.
1. *City assessment roll — Failure to describe at all when not cured — County Treasurer's deed.*— Where a description of ten city lots, as contained in the city assessment roll, does not describe any property belonging to a person assessed thereon and therefor, the assessors have no jurisdiction to lay the assessment; and where, after confirmation, the city sells for non-payment of taxes, and buys in, it acquires thereby no tax lien enforcible against the owner or his grantee. The assessment being void, a subsequently passed local statute, validating prior city taxes notwithstanding any omission or error in the proceedings, etc., or in the assessment as made, cannot cure the defect. A county treasurer's deed — resulting from a failure to pay county taxes and a foreclosure had on that lien — when containing a description of the ten lots different from that in the roll, passes no title to the purchaser and the owner of the land is not estopped from showing that deed to be void. City of Rochester v. Farrar, 394.

2. *Order dismissing an action to recover a personal tax levied in New York city — When it will not be granted — Meaning of the words "equitable defense."*— Section 934 of the Greater New York Charter as amended by chapter 624 of the Laws of 1904, which authorizes the granting of an order dismissing an action to enforce a personal tax levied in the city of New York if the defendant has an "equitable defense" to the suit, means a defense of which a court of equity would take cognizance. Such an order will not be granted when the moving papers simply deny that the defendant was liable to an assessment upon personal property for the year in question, and state that the defendant had never before been assessed upon personal property, that he never received any notice that the tax in question had been assessed upon him until long after the time allowed by law to have the assessment roll corrected, that he had no personal property subject to taxation at the time the assessment in question took effect and that his debts at that time nearly equaled the value of his personal property, but do not state that the defendant is unable to pay the tax. City of New York v. Holzderber, 509.

See **Transfer Tax.**

THEATRES.
See **City of New York.**

TITLE.
See **Deeds.**

TORT.
See **Pleading.**

Digitized by Google

TOWNS.
See **Boards of Health; Bridges; Highways; Municipal Corporations.**

TRANSFER TAX.
1. *On life and remainder interests left in trust payable out of capital — Federal tax similarly payable.*— Under the amendments to section 230 of the Tax Law made in 1899 and 1900 the transfer taxes on life interests and remainder interests, in a fund left in trust, are equally payable forthwith out of the capital and this although the remainders are contingent. The Federal taxes under the War Revenue Law of 1898 are similarly payable out of capital. Matter of Hoyt, 76.

2. *Creditors may reach personalty which the administrator paid for the transfer tax on realty descending to the heirs.*— Where it appears that the administrator has paid from personalty the transfer tax on realty, to which the heirs succeeded under the decedent, the administrator is subrogated to that claim for the benefit of the creditors. Hughes v. Golden, 128.

3. *When securities, representing the interest a deceased non-resident legatee had in the estate of his deceased non-resident father, are taxable.* — Where the will of a non-resident of the State of New York has been admitted to probate in this State and securities, representing the interest he had in the estate of his father, also a non-resident, have, since the legatee's death, come into the hands of his executors and are, at the time of a transfer tax appraisal, in their possession in this State, the securities are subject to the transfer tax. Matter of Clinch, 190.

See **Partition.**

TRESPASS.
See **Injunction.**

TRIAL.
Motion for a nonsuit — It must be made at the end of the case as well as at the end of the plaintiff's proof — The fact that the defendant's proofs did not change the situation is immaterial.— Where, at the close of the plaintiff's case, the defendant makes a motion for a nonsuit, and, after excepting to the denial thereof, proceeds to put in his proof, if he neglects to renew his motion for a nonsuit at the close of all the evidence, he will be deemed to have waived his previous exception and to admit that the evidence is sufficient to warrant the submission of the case to the court or jury. In such a case it is not material that the evidence given upon the part of the defendant did not change the situation from that existing at the close of the plaintiff's evidence. McDowell v. Syracuse Land & Steamboat Co., 627.

See **Costs.**

TRUST COMPANIES.
See **Corporations.**

TRUSTEES.
See **Trusts.**

TRUSTS.
1. *"Lawful children"— When "children" is equivalent to "descendants."*— A testatrix, after creating a trust in real estate to pay the income equally to her five children for life, during the lives of two of them, Louisa and Henry, with remainder in one-fifth of the corpus to the heirs of each, directed that if a child died during the trust his or her share of the income should pass to his or her surviving "lawful children." Henry died after the testatrix and left a child Christina, who also died and left children. Held, that the grandchildren of Henry

Digitized by Google

were entitled during the trust to one-fifth of the income. That, treating the word "children" in its primary sense, Christina, on Henry's death, became owner of one-fifth of the net income for the residue of the trust period, which income on her death passed to her children as her heirs and that after her death, if the gift of income was limited to her life, the share of income, not being disposed of by the will, passed to the persons presumptively entitled to the next eventual estate, her children, who are the heirs of Henry and as such entitled to one-fifth of the corpus at the end of the term. That the testatrix did not intend to die intestate as to any part of her estate and also intended that the descendants of Henry should stand in his place during and at the end of the trust term and that, if necessary to effectuate this intention, the word "children" should be read as meaning "descendants." Matter of Bender, 79.

2. *In a savings bank deposit — What acts make its creation doubtful — When a valid trust exists in such a deposit and in bank stock.*— It is doubtful whether the mere fact that a person opens a trust account in a bank, for another in his own name as trustee, is sufficient to enable a trial court to find that a valid trust was created. Where a father opens savings bank accounts in the names of his two sisters, as trustees for his daughters, and delivers the pass-books to the sisters, a valid trust is created for the daughters, and where the trustees subsequently draw the moneys and let the father have them, they are liable therefor to the daughters. The placing by the father of bank stock in trust for the daughters, in the name of the same trustees, creates a trust for the daughters in respect to the bank stock. Lattan v. Totten, 116.

3. *Surviving trustee — Liability for the devastavits of his deceased co-trustee — When permitting securities of the corpus to remain of the same negotiable character as they were at the testator's death and purchasing others without requiring them to run or be registered in the names of both trustees is not negligence in the surviving trustee — When his giving each trustee, instead of both jointly, access to a fund in a safe deposit vault, is not negligence — When his turning over unregistered railroad bonds, he had purchased, to his co-trustee is excusable — When his executing assignments of mortgages and permitting the co-trustee to retain the proceeds, is defensible — When the failure of the surviving trustee, for five years, to examine a safe deposit box, when examination might have prevented a loss, is excusable.*— Upon the final settlement of the accounts of John F. Halstead, surviving trustee under the will of Charles J. Buckingham who died in 1889 and by his will created trusts for his two children, and upon which accounting they sought to charge Halstead with the *devastavits* of his deceased co-trustee, Robert F. Wilkinson, who died in 1903 a debtor to the trust funds in almost their entire amount, it appeared that the trustees had accounted as executors in 1890 when they took over the trust funds from themselves as executors, in 1892, and in 1898, that Wilkinson had been implicitly trusted by the testator and was so trusted by the children, the beneficiaries, until his death, they having given him powers of attorney to endorse checks and receive for them all trust income, that about the time of the accounting of 1892 Wilkinson, who had been in possession of the testator's securities during the latter's lifetime and since then, hired, in Poughkeepsie where he lived, a box in a safe deposit vault for the securities of the corpus of the trusts and gave Halstead a key thereto, that in 1898 Halstead went to the vault with Wilkinson, that the latter showed him the securities, that Halstead found them correct, that Halstead never examined the securities again until after Wilkinson's death, when he found that the latter had surrendered the original box and that only a remnant of the securities was in another box, hired by Wilkinson individually. It further appeared

Digitized by Google

TRUSTS — Continued.
that, at the time of the accounting of 1898 a very large part of the corpus of both trust funds consisted of unregistered railroad and municipal bonds and of notes secured by trust deeds of Illinois farm lands, that the notes and deeds were taken in the name of local agents who assigned or endorsed them in blank, and that all these instruments remained, while in the hands of the trustees, in the condition above described. It further appeared that Halstead purchased some of the railroad bonds, delivered them to Wilkinson for deposit, was consulted by him as to investments, kept the income account, that every month Wilkinson sent to Halstead, who lived in Brooklyn, what purported to be income, that Halstead deposited it to the joint credit of the trustees in a New York city bank, drew checks on the account made payable to the beneficiaries, that these checks were returned to Wilkinson, and that he, after signing them under his powers of attorney, deposited them in his individual account and therefrom had paid the beneficiaries, with punctuality, until two weeks before his death. Held, that upon the facts, Halstead was not negligent in permitting the securities to remain of the same negotiable character as they were at the death of the testator or in purchasing others without requiring them to be made payable to or be registered in the names of the trustees jointly, the beneficiaries having failed to show any circumstance which tended to arouse their own suspicion or that of the surviving trustee or that there was the slightest reason to suppose that the safety of the fund was in danger. That, as there had been no actual joint possession of the fund up to the time of the transaction by which the fund became accessible to each trustee, that transaction did not constitute negligence in Halstead. That his turning over to Wilkinson, who had the actual custody of the fund, the unregistered railroad bonds which Halstead purchased, was, considering he purchased them in New York and there gave them to Wilkinson to take back to Poughkeepsie to the safe deposit vault there, a delivery defensible as necessary in the usual course of business. That another charge of negligence, based upon the fact that Halstead joined necessarily in the execution of several assignments of mortgages belonging to the trusts and permitted Wilkinson to retain the proceeds, was not maintainable, where it appeared that Halstead's execution of the assignments was necessary in the ordinary course of business. That Halstead's failure to examine the safe deposit box between 1898 and 1903 was not a negligent act, as he had no knowledge of his co-trustee's wrongful acts or anything to put him on inquiry and as he had, on the facts, done no wrong and omitted no duty. Matter of Halstead, 176.

4. *For life — Interest acquired by a trustee upon a purchase of stock in a bank — Rights of one, claiming under the life tenant, in a fund the trustee received upon the bank's liquidation of its affairs and redemption of its stock.*— Where a trustee, appointed by the court under a testamentary trust created by a testator in 1857 to sell his real estate, invest and reinvest the proceeds in bank stock and pay one (still living) of his three daughters one-third of the dividends, income and profits during her life — with directions as to the disposal of the principal of her share upon her death — purchases in 1884, stock in a domestic bank, he thereby acquires in all its assets — whether called capital, surplus or undivided profits — as they were in 1884, an interest commensurate with his shares; and where, through a subsequent trustee, the life interest of the life tenant in the stock, its dividends and profits, is acquired by a foreign bank and thereafter and in 1903 the trustee, upon the domestic bank's liquidating its affairs and retiring and redeeming its stock, receives a fund representing his interest as trustee in the capital, surplus and undivided profits, the foreign bank is not, when the fund becomes available for distribution, entitled to the whole of it but only pro rata to the undivided profits earned between 1884

Digitized by Google

TRUSTS — Continued.
and 1903 and, in addition, to the income of the remainder of the fund while the life tenant lives. Tuttle v. First National Bank, 318.

5. *Unexecuted — Receiver and referee when appointed.*— Where the papers on a motion to confirm the appointment of one McCormick to execute any trust left unexecuted by one Knapp (who died in 1887) as receiver or trustee for the benefit of a savings bank, show that in 1871, one Selmes, then indebted to the bank, conveyed to it certain premises, and alleged by the petitioner to be owned by him and worth $54,000, for the sole purpose of assisting the bank and its receiver in paying its depositors, that, in 1872, Selmes conveyed to Knapp on certain trusts, that in 1889, Selmes conveyed to one Lockwood all his right in the said premises as well as his reversion upon termination of the trusts, the petitioner claiming to have succeeded to that interest, and that Knapp never conveyed the premises nor accounted for trust moneys with which a decree had charged him, the court will appoint a receiver with full power in place of Knapp to realize upon the interest in the premises as well as upon the unadministered assets and ascertain whether at his death Knapp had accounted for the moneys with which the decree charged him. Matter of Townsend, 415.

See **Executors and Administrators; Will.**

UNDUE INFLUENCE.
See **Will.**

UNITED STATES STATUTES.
Act of Congress, March 11, 1902, *creating the Southern District of Texas and transferring pending causes in the Eastern District thereto — A cause, in which one party has died, was thereby transferred as pending action.*— The Act of Congress of March 11, 1902, creating the Southern District of Texas, transferred, from the Eastern District, pending actions and provided that those causes should be retained, in the Eastern District, in which evidence had been taken "before the present District Judges of the Judicial Districts of Texas as heretofore constituted." Baldwin v. Rice, 64.

VERDICT.
See **Motions and Orders.**

VETERANS.
Soldier in a Soldiers' Home, when kept in an "asylum" — Does not lose his former residence.—A soldier, kept in a Soldiers' Home maintained in the town by the State, is, within section 3 of article II of the State Constitution, a person kept in an "asylum", and, under that section, does not, when becoming an inmate of the Home for the sole purpose of enjoying its benefits, thereby gain or lose his former residence, it remaining his domicile for citizenship. When the general election in the State and the biennial meeting of the town are held on the same day, he cannot, under section 12 of the Town Law, vote for town officers unless he could have voted at the general election, and where, although unregistered, he is permitted to vote on the local option questions, his illegal vote is a circumstance favoring ordering a resubmission, where his vote may have changed the result. Matter of Smith, 384.

See **Civil Service.**

WARRANT.
See **Courts of Special Sessions; Criminal Law.**

WARRANTY.
See **Sales.**

Digitized by Google

WILL.

1. *Testamentary trust in a residuary estate — A provision, excluding a grandson, defeated by the testator's limiting the succession of each of his children to issue and failing to direct disposition of the share of a child who died after him, without issue and pending the trust — Devisable remainder — The word "previously", in the phrase, "if they (the sons) shall have previously died leaving issue" held not to be limited to a death occurring in the lifetime of the testator — When the corpus does not vest in remainder.*— A testator left a widow, two daughters, three sons and a grandson, gave his entire residuary estate to his executors, in trust, to collect the rents, etc., pay out of the net income an annuity to his widow in lieu of dower and divide and pay the residue of income equally to and among the children, or the issue of a child dying, until the death of the two daughters — who are still living. He directed that, if any of the children should die before him without issue surviving them, the net income should be divided among those living or represented. Upon the death of the two daughters, he devised the entire estate to the issue of the two daughters, to the issue of the three sons, "or to the issue of either of said sons, if they shall have previously died leaving issue, such issue taking the share which would have belonged to its parent in equal share; hereby excluding my grandchild * * * or his issue from any participation in the division of my residuary estate." A son died, pending the trust, intestate, unmarried and without issue. Held, that the will contained no provision as to the disposition of a share, or of the income of a share, of a child who died, pending the trust, without issue and after the death of the testator, that he died intestate as to such share and its income, and that the grandson, although excluded by the will, was entitled to his proportion of such share, and of its income, as in intestacy. That, if the will gave each of the three sons a vested remainder in one-fifth of the *corpus* of the trust, the remainder was subject to be divested, as to a son, by his death without issue before the end of the trust and the division of the estate, for the words "or to the issue of either of said sons, if they shall have previously died leaving issue" plainly refer to a death at any time previous to such division. That the *corpus* did not vest in remainder during the trust, the whole estate being vested in the trustees. People's Trust Co. v. Flynn, 6.

2. *Undue influence — Opportunity and motive to exert it — How far it must control — Feebleness of mind and body as affecting testamentary capacity.*— Opportunity to exercise undue influence upon a testator, with motive to exert it, is insufficient to establish its exercise as it must further appear that the undue influence was sufficient to overcome his will. To avoid a will on this ground, the conclusion must be inevitable that the testator's mentality was reduced to helplessness and that he succumbed to an influence making his will another's. Feebleness of mind and body raises no presumption of a lack of testamentary capacity. Matter of Hawley, 186.

3. *Mutilation by cutting out a clause and pasting together the edges of the remaining parts — When it is not to be deemed a lost or destroyed or revoked will.*— The fact, that after execution of a will its first subdivision was cut out and the edges of the remaining parts of the will fastened together by a piece of paper pasted on them and that the piece cut out cannot be found, is not a sufficient reason for denying the will probate, as lost, destroyed or revoked, where it is shown on probate that the testatrix just before she died and six years after she executed the will, wrote a letter, put in evidence, to a person in which she said she had appointed him her executor some years before, that she has a box with her will and other papers in it, that the notes he finds in the box are to be given to a certain person named and that he may keep the box, and where, in addition, the scrivener and a subscrib-

Digitized by Google

WILL — Continued.
ing witness to the will testify to the substance of the missing clause. Matter of Westbrook, 339.

4. *Bequest of more than half of a testator's estate to charity — When the widow's dower should be considered and when it should not — When parties nominated in the will do not take under the will but under a deed of trust — Rejecting portions of a will in order to uphold the remainder — When a residuary legatee may not question the validity of the trust.* — In determining whether a testator had undertaken to devise more than one-half of his devisable estate to charity in contravention of chapter 360 of the Laws of 1860, the value of the widow's dower interest must be deducted from the gross value of the estate, unless she has elected to accept a provision of the will in lieu of dower, in which case, the release of the right of dower will be held to date back to the testator's death, and, in determining the proportion of the estate given to charities, no deduction or allowance of the widow's dower interest from the gross estate will be made. Where the testator uses words of bequest in his will, in giving to certain charitable organizations his estate in remainder in a trust fund, the title to which was vested in a trust company for the life of a beneficiary living at the time of the testator's death, with a provision that on the death of the life beneficiary the principal sum should revert to the testator if living, or if he should have previously died, to such person or persons as he should, by his will, direct, the charitable organizations to which such estate in remainder is given by the will take the fund not as devisees under the will, but as appointees under the deed of trust, and the value of the testator's estate in remainder will not be considered in determining the proportion of his estate devised to charities. Where the invalid portions of an attempted bequest or devise can be expunged without essentially changing or destroying the general testamentary scheme, the valid parts of the will will be upheld; thus where the purpose of the testator, so far as it is lawful, can be carried out by expunging an invalid trust and accelerating the estate in remainder attendant thereon, this will be done. In such a case, as the residuary estate will not be in any way augmented thereby, a residuary legatee under the will, who claims that the testator has given more than one-half of his estate to charity, in violation of the statute, has no standing in court to ask an adjudication in respect to the validity of the trust. Lord v. Lord, 530.

5. *What are benevolent and charitable purposes — What detail of definition is required of the beneficiaries of a corporation — Delegation of discretionary powers — Incorporation validated by legislative enactment — Formalities of incorporation may be dispensed with — The constitutional provision as to incorporation under general laws is permissive — What devise to a charitable corporation does not create a trust — What establishes a secret trust — What provisions for annuitants do not involve an unlawful suspension of the power of alienation — Charge upon real property — Estates, suspended on two selected lives, for the benefit of any number of persons — Trusts and annuities distinguished.* — The certificate of incorporation of The Havens Relief Fund Society provided, "That the particular business and objects of such society shall be the receipt of such money and property as shall be voluntarily contributed, paid, conveyed, devised, bequeathed or in any way transferred to the society and the investment of the same to produce an income, and the application of the income from time to time through corporate or private agencies to the relief of poverty and distress, and especially the affording of temporary relief to unobtrusive suffering endured by industrious or worthy persons, but including the bestowal and distribution of any part of such income to and among benevolent and charitable institutions, objects or persons, such as shall be deemed most useful and deserving or judicious, considering the different modes of applica-

Digitized by Google

tion and expenditure or use of funds, and the practical results, and including the right to employ and superintend almoners, without being required or undertaking to act immediately or directly as almoners, and generally in respect to any property received by deed or will for any benevolent or charitable use or purpose, including the right to comply with the directions of the donor in regard thereto." *Held* that the particular business and objects of this society were benevolent and charitable within the meaning of those terms as used in section 1 of chapter 319 of the Laws of 1848, and that the society was lawfully incorporated under that act; that the scheme contemplated by it did not involve the delegation by it of the discretionary power of selection of its beneficiaries; that even if the certificate alone was insufficient to effect the creation of a valid corporation, the legislature by chapter 301 of the Laws of 1871, which was passed four months after the filing of the certificate of incorporation, for the primary purpose of removing the limit to the amount of property which the society might take and hold, and which contained a verbatim recital of the purposes and objects of the society as they were stated in the certificate of incorporation, validated the incorporation of the society, or else created a valid corporation in the first instance; That a charity is an undertaking which contemplates the public benefit or the well-being of a community or class as contrasted with a benevolent use for a private purpose or for a private individual; that in the incorporation of a charitable society, the law does not require the ultimate recipients of the bounties of the society to be minutely and precisely identified; that the legislature, being the power authorized to prescribe the formalities requisite to the formation of a corporation, has the right to dispense with such formalities or to legalize the existence of a corporation whose organization was defective because of a failure to comply with such requirements; that, in the absence of a constitutional requirement, no certain terms or express words are necessary to effect the granting of a corporate franchise; that any expression whatsoever showing the legislative intention to confer the right to exercise corporate franchises is sufficient and that this intention may be deduced from the whole of the legislative act; that the use of the word "incorporate" or of a similar expression is unnecessary; that section 1 of article VIII of the State Constitution, which provides, "Corporations may be formed under general laws; but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws," is not mandatory in its requirement that corporations be formed under general laws, but permissive; that, whether a special act of incorporation is necessary is a matter entirely within the judgment and discretion of the legislature and that the courts have no power to review its action in this regard; that a devise and bequest of a residuary estate to a charitable corporation, "to be held and applied by the said Society for the purposes of the incorporation thereof, it being my wish however that the principal be kept invested and only the income distributed or expended for the charitable purposes of the society," does not create a trust, but simply a gift outright to charitable uses and consequently does not offend public policy or the statute against perpetuities; that to fasten a secret trust upon a trust created by will, such trust must spring from the intention of the testator and from the promise, express or implied by silent acquiescence or tacit consent, of the legatee; that the only intention of the testator which can be considered is that of his last will, and the only promise a promise made with reference to such will. By the fifth, thirteenth, fourteenth and nineteenth clauses of a will, the testator provided for the payment of annuities to six persons. The provisions of these six annuities were substantially similar. None of them was in terms charged on any lands or specific fund, but the executors were simply directed to pay them in certain installments.

Digitized by Google

WILL — Continued.
By the sixth clause of the will, the testator devised certain land on Thirtieth street in the city of New York to his executors upon trust "to apply such net income to the extent or limit of twelve hundred dollars per year to the use of my namesake, Charles G. H. Stephens, son of Amelia W. and Edgar W. Stephens, from and after my decease until he attains the age of twenty-five years and thereafter to the limit or extent of one thousand dollars per year to the use of the said Charles G. H. Stephens during his remaining natural life. And I also direct my executors to apply the said net income to the limit or extent of six hundred dollars per year to the use of Charlotte A. W. Tilden, the adopted daughter of my deceased namesake, Charlietta G. H. Tilden, during her remaining natural life in the manner however and subject to the conditions provided in the sixteenth article of this my will. And subject to the preceding provisions of this article and to the extent that it is within my power so to do I charge upon the said lands and premises and upon the net income thereof each and every the annuities payable under this my will. * * * And subject to the provisions of this item of my will and except in so far as the said lands and premises or the income thereof shall be actually applied or used to and for the satisfaction of such provisions I direct that the same disposition be made of the said lands and premises and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate." By the seventh clause of his will, the testator devised certain leashold lands on Nineteenth street in the city of New York upon a trust to apply the net income to the extent of $1,000 a year to the use of Amelia W. Stephens for life. The executors were empowered to purchase the fee of the leasehold lands, in which event the lands were made subject to the provisions of the trust. The seventh clause further provided, "subject to the provisions of this item of my will and except in so far as the said leasehold lands and premises or the fee if acquired thereof shall be actually applied or used to and for the satisfaction of such provisions I direct that the same disposition and application be made of the said leasehold lots of land and premises or the fee if acquired thereof and of all proceeds and revenue thereof as is hereinafter directed for and in respect of my residuary estate. And in case and to the extent that the income so applicable to the use of the said Amelia W. Stephens shall not be equal to the annual sum of one thousand dollars throughout the period of her natural life from and after my decease then and in such case and out of my general estate my executors are directed to make good and pay in quarterly or other convenient instalments the deficiency or amount necessary to ensure to her such annual sum." The seventeenth clause of the will made general provision for all the annuities in the following language: "My executors are authorized to set apart and safely invest and keep invested such sums as in their reasonable discretion they shall deem proper to secure payment of the hereinbefore mentioned annuities and annual sums and meet any of the provisions of this my will except and to the extent that the same are hereinbefore adequately provided for. And whenever and as each or any fund set apart or provided for these purposes ceases to be needed therefor I direct that the same disposition or application be made of the same or if any remainder thereof as is hereinafter provided for or in respect of my residuary estate." *Held* that the trusts created for the benefit of the several annuitants did not involve an unlawful suspension of the power of alienation; that the Thirtieth street property was tied up for two lives only, to wit, those of Charles G. H. Stephens and Charlotte A. W. Tilden; that the Nineteenth street property was tied up for one life only, to wit, that of Amelia W. Stephens; that the remaining six annuities stood as independent gifts, supported, if need be, by independent trusts; that such six annuities would be payable out of the general estate or by the setting apart of specific sums; that a testator may in the creation of

Digitized by Google

WILL — Continued.
a trust, suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being, and with this limitation during that period he may provide for the distribution of the annual income among as many different persons and for as many successive lives as he sees fit; that the importance of the distinction between a trust to pay annuities and the trust to pay income lies in the fact that the latter trust invariably occasions a suspension of the power of alienation, while annuities, in so far as they may be classified as legacies or as successive payments of sums in gross, are releasable and assignable and do not occasion suspension. Smith v. Havens Relief Fund Society, 594.

6. *A trust in favor of a child not living at the testator's death is void — When a trust, void as to one of several beneficiaries, will be enforced in respect to the others — When the property bequeathed upon a void trust does not pass under the residuary clause.* — A will directed the payment of the income of a trust fund to one of the testatrix's sons during his life and provided that upon his death the principal thereof should be divided into as many shares as he might leave children him surviving. It created trusts in each of such shares for the benefit of each of the children so surviving during their respective lives. The life beneficiary died after the testatrix, leaving him surviving two children, one of whom was born during the lifetime of the testatrix ond one of whom was born after her death. *Held* that the trust for the life of the child born after the death of the testatrix was void because it would effect a suspension of the power of alienation for a life not in existence at the time of the death of the testatrix; that, as it was apparent from an inspection of the will, that the testatrix did not intend to make an equal division of her estate among the beneficiaries, the invalidity of the trust did not disturb the general scheme of distribution to such an extent as to require that the whole or any part of the legacies to children or other grandchildren of the testatrix should fail; that, as the testatrix, when describing the residuary estate in the residuary clause of the will, expressly excluded the trust fund, the invalid trust fund would not pass under the residuary clause, but that the testatrix died intestate in respect thereto. Matter of Faile, 619.

See Surrogate's Court.

WITNESS.
Credibility of — When the jury may not disregard uncontradicted testimony. — Although, upon a jury trial, the credibility of a witness presents a question for the jury, yet when the defendant and one of his witnesses, who are in no way discredited, testify to a fact within their own knowledge, which is not of itself improbable, or in conflict with other evidence, the fact is to be taken as legally established and cannot be disregarded by the court or jury. Spring v. Millington, 624.

See Evidence.

WRIT OF ASSISTANCE.
See Fraudulent Conveyance.

Ex. A. L. B.
1/18/05.

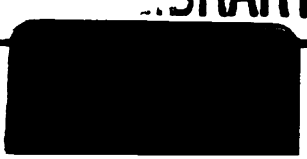
7167 015

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LIBRARY



Digitized by Google

Digitized by Google